No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELECTRO-NUCLEONICS, INC.,
Petitioner

v.

THE WASHINGTON SUBURBAN SANITARY COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

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QUESTIONS PRESENTED

1. Is the Maryland Court of Appeals' ruling in this case —that the 3 year statute of limitations period for the *per se* taking of reciprocal negative easements benefitting adjacent property owners within the Montgomery Industrial Park began to run at the time the burdened estate was condemned in 1980—constitutionally permissible even though the owners of estates benefitted by the negative easements were not joined in the 1980 condemnation action and the State did not actually begin operations on the burdened estate in violation of the negative easements until 1983?

2. Is it consistent with the requirements of the fifth amendment, made applicable to the states through the fourteenth amendment, for the Maryland Court of Appeals to hold that a cause of action in inverse condemnation based on the *per se* taking of reciprocal negative easements benefitting property adjacent to that actually condemned, begins to run as of the date the burdened property is condemned, even though, in this case, such a ruling explicitly precluded the possibility that severance damages could be awarded since government operations on the condemned property only began 3 years after the burdened estate was condemned?

3. Is this Court's opinion in *United States v. Dickinson*, 331 U.S. 745 (1947) applicable to both *per se* and nonpossessory takings claims and, if so, is it constitutionally permissible to deem the same statute of limitations to accrue at different times for *per se* and nonpossessory takings claims both arising out of the same nucleus of operative facts?

4. Notwithstanding this Court's prior ruling in *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3145 (1987), that the magnitude of a party's dam-

ages does not affect the determination of whether a nonpossessory taking has occurred, was the Maryland Court of Appeals correct in ruling in this case that Electro-Nucleonics, Inc. presented insufficient evidence of the extent of its damages "at this time" to withstand a motion for summary judgment on its claim for a nonpossessory taking? If so, what elements must be shown to withstand a motion for summary judgment in a case such as this one, where the government is only operating at 33% of projected levels and has prevented discovery—in the form of air quality tests taken pursuant to a request for entry on land—from occurring?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are Electro-Nucleonics, Inc., plaintiff below and owner of a parcel of land in the Montgomery Industrial Park which is both benefitted and burdened by certain reciprocal negative easements, and the Washington Suburban Sanitary Commission ("WSSC"), an agency of the State of Maryland and defendant below, which condemned a portion of the Montgomery Industrial Park and subsequently began operating a sewage sludge composting facility in violation of three of the reciprocal negative easements.

RULE 28.1 LISTING

The following is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner ELECTRO-NUCLEONICS, INC.:

Pharmacia, Inc. (parent company)

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PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Electro-Nucleonics, Inc. respectfully prays that a Writ of Certiorari issue to review an order of the Maryland Court of Appeals entered on May 5, 1989, denying a motion for reconsideration filed by Electro-Nucleonics, Inc. and that court's prior order filed on March 13, 1989. Copies of these orders are included in the appendix attached to this petition.

OPINIONS BELOW

The order and mandate dated May 5, 1989, the corrected mandate dated May 10, 1989 and the order and opinion dated March 13, 1989, appear in the appendix attached to this petition. *See Electro-Nucleonics, Inc. v. Washington Suburban Sanitary Commission*, 315 Md.

361, 554 A.2d 804 (1989). The opinion and order of the trial court were rendered in open court. Transcripts of the court's rulings are reproduced in the appendix attached to this petition.

JURISDICTIONAL STATEMENT

Summary judgment was granted in favor of the respondent in an oral ruling on May 2, 1988, which incorporated by reference the trial court's findings at a hearing held on February 5, 1988, when the trial court denied the petitioner's motion for partial summary judgment. App. 69a. The Maryland Court of Appeals affirmed the judgment on March 13, 1989, App. 1a, and denied the petitioner's motion for reconsideration on May 5, 1989. App. 23a.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (West 1989 Cum. Supp.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V.

U.S. Const. Amend. XIV.

Md. Const. Art. III, § 40.

Md. Declaration of Rights Art. 24.

Md. Cts. & Jud. Proc. Code Ann. § 3-412 (1984).

Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984).

Md. Cts. & Jud. Proc. Code Ann. § 5-103 (1984).

Md. Real Property Code Ann. § 12-104 (1988 & Cum. Supp.).

STATEMENT OF THE CASE

Petitioner Electro-Nucleonics, Inc. operates a biomedical research facility in the Montgomery Industrial Park. The 347 acre industrial park is subject to a series of reciprocal negative easements created in 1956 and 1959 for the purpose of ensuring its uniform, pollution-free character and preserving property values. The negative easements, in part, prohibited use of properties within the industrial park for a dump or sanitary landfill, dumping of waste material or refuse, permitting waste or refuse to remain upon any part of the property outside of buildings, and emitting objectionable odors outside of lot lines.[1]

In 1971, Electro-Nucleonics, Inc. moved into the Montgomery Industrial Park, in part because the reciprocal negative easements governing the property guaranteed the company the relatively germ-free air it needs to manufacture its bio-medical products.[2]

In 1978, in litigation relating to the disposition of sewage sludge generated at the District of Columbia's Blue Plains sewage treatment plant, the United States District Court for the District of Columbia ordered the respondent, the WSSC, to build a sewage sludge composting facility on a portion of the Montgomery Industrial Park known as "Site 2." At that time, the WSSC advised the court,

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[1] Copies of the declarations containing the reciprocal negative easements were attached to Electro-Nucleonics, Inc.'s motion for partial summary judgment. The facts set forth in this statement of the case are supported by documentation attached to that motion and accompanying memoranda of law, which the trial court considered in subsequently ruling upon the WSSC's motion for summary judgment.

[2] At present, Electro-Nucleonics, Inc. manufactures the AIDS virus, which it provides to the National Institutes of Health and other medical research facilities working to develop treatments and, ultimately, a cure for this dreaded disease. Air from the atmosphere is filtered several times through High Efficiency Particle Filters to maintain the proper environment to manufacture biomedical products.

through counsel, that in addition to condemning the land known as Site 2, the WSSC would need to condemn the property rights in the reciprocal negative easements of all other landowners in the industrial park, because operation of the proposed sewage sludge composting facility would violate three of the reciprocal negative easements. The WSSC's stated intention to condemn all negative easements affecting any portion of the industrial park was subsequently reiterated in a brief filed with the United States Court of Appeals for the District of Columbia Circuit.

In 1980, the WSSC acquired title to Site 2 through eminent domain proceedings brought only against the owners of the parcels comprising Site 2. Neither Electro-Nucleonics, Inc., nor any other owner of land in the industrial park outside of Site 2, were named, given notice or joined in that action.

Thereafter, on November 6, 1980, the WSSC filed a declaratory judgment action against Electro-Nucleonics, Inc. and other landowners in the Montgomery Industrial Park alleging that it was *not* liable for damages "stemming from the violation, abrogation, or non-observance, or the anticipated violation, abrogation or non-observance of record covenants . . . or for a purported 'taking' of property rights or interests without the payment of just compensation, all stemming from the acquisition of [site 2] for a public use." The trial court entered a declaratory judgment in favor of Electro-Nucleonics, Inc. and the other defendants based on the finding that the landowners in the Montgomery Industrial Park had property interests in the reciprocal negative easements benefitting their properties, which could not be violated by the WSSC simply because it had acquired title to Site 2 through condemnation proceedings. That judgment was upheld by the Maryland Court of Special Appeals, the state's intermediate appellate court, and was subsequently vacated on procedural grounds by the Maryland Court of

Appeals, the state's highest appellate court. *See WSSC v. Frankel*, 57 Md. App. 419, 470 A.2d 813 (1984), *vacated on procedural grounds*, 302 Md. 301, 487 A.2d 651 (1985).

In April, 1983,[3] operations began in earnest at the WSSC's sewage sludge composting facility.[4] Thereafter, the facility began emitting bio-burden and fungal spores in high concentrations, through its smoke-stacks, onto adjoining properties. These operations significantly affected Electro-Nucleonics, Inc.'s ability to operate its biomedical facility, because of Electro-Nucleonics, Inc.'s need for a constant supply of relatively germ-free air.

On March 27, 1986, Electro-Nucleonics, Inc. filed suit in inverse condemnation in the Circuit Court for Montgomery County, Maryland.[5] Contemporaneously, Electro-Nucleonics, Inc. moved for partial summary judgment on the issue of liability, alleging (1) that the WSSC's operation since 1983 of a sewage sludge composting facility, in violation of three reciprocal negative easements governing

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[3] Electro-Nucleonics, Inc. relied on the WSSC's own exhibits in alleging that that was the date operations began. The WSSC argued that it began operating the sewage sludge composting facility in December, 1982, when it received its first shipment of unscreened compost, rather than in April, 1983, when it first began processing raw sewage sludge. If not clearly established by the WSSC's own exhibits, the date operations began at the facility constitutes a disputed material fact which has not yet been resolved, as there has been no trial in this case.

[4] Throughout the course of this litigation, the WSSC's sewage sludge composting facility never operated at more than 33% of its projected full capacity level.

[5] The federal issue presented by this petition was first raised in Electro-Nucleonics, Inc.'s complaint. App. 76a. Electro-Nucleonics, Inc. alleged a taking without just compensation in violation of the fifth amendment to the United States Constitution, as made applicable to the states by virtue of the due process clause of the fourteenth amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963); *Chicago B. & O.R. Co. v. Chicago*, 166 U.S. 226, 235-41 (1897). Electro-Nucleonics, Inc.'s claims were also based on Md. Const. Art. III, § 40 and Md. Declaration of Rights Art. 24.

the Montgomery Industrial Park, effectuated a *per se* taking of Electro-Nucleonics, Inc.'s property interest in the reciprocal negative easements;[6] and (2) that the WSSC's emission, through artificial means, of fungal spores and bioburden directed at Electro-Nucleonics, Inc.'s property effectuated a nonpossessory taking by destroying its reasonable, investment-backed expectation that by locating its specially-designed bio-medical research facility in an industrial park governed by negative easements guaranteeing the air quality, Electro-Nucleonics, Inc. could obtain the relatively germ-free air that it needs to conduct its research.[7]

The WSSC then moved for summary judgment on January 26, 1988, based on the then-recently decided state court opinion in *Maryland Port Administration v. QC Corp.*, 310 Md. 379, 529 A.2d 829 (1987), alleging that Electro-Nucleonics, Inc. had failed to present sufficient evidence to obtain relief for a taking. A hearing was held on Electro-Nucleonics, Inc.'s motion on February 5, 1988. App. 29a. The Montgomery County Circuit Court denied the motion and, at the WSSC's urging, incorporated its reasoning from that hearing in its subsequent ruling granting the WSSC's motion for summary

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[6] *See Loretto v. Tele-prompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also Chapman v. Sheridan—Wyoming Coal Co.*, 338 U.S. 621, 626-27 (1950) (a negative easement is an interest in land).

[7] *See Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *see also Richards v. Washington Terminal Co.*, 233 U.S. 546, 557 (1914) (smoke and gas artificially expelled by the government onto the property of an adjacent landowner, which causes a particularized injury, amounts to a taking for which just compensation must be paid); *United States v. Causby*, 328 U.S. 256 (1946) (military planes repeatedly flown over a chicken farm effectuated a taking); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (deliberate and repeated firing of batteries over the plaintiff's land amounts to a taking).

judgment on May 2, 1988. App. 67a. The trial court reasoned that the reciprocal negative easements governing the entire industrial park had been "severed" at the moment the State condemned a portion of the industrial park in 1980, to operate its sewage sludge composting facility on Site 2. Thereafter, the trial court reasoned, the negative easements could neither be violated nor taken.

The Maryland Court of Appeals granted certiorari on June 30, 1988, and issued an opinion affirming the judgment on March 13, 1989. App. 1a. The Court of Appeals held that Electro-Nucleonics, Inc.'s claim for a *per se* taking was barred by the three year statute of limitations set forth in Md. Cts. & Jud. Proc. Code Ann. § 5-101 (1984); and held that insufficient evidence was presented "at this time", app. 22a, to withstand a motion for summary judgment directed at its cause of action for a nonpossessory taking. Electro-Nucleonics, Inc.'s motion for reconsideration was denied on May 5, 1989. App. 23a.

REASONS FOR GRANTING THE WRIT

It has been forty-two years since this Court first held, in *United States v. Dickinson*, 331 U.S. 745 (1947), that the statute of limitations period for filing a claim in inverse condemnation does not begin to run until such time as the extent of the government's intrusion stabilizes. This Court has not had occasion to further elaborate on its holdings in *Dickinson*, even though the law of inverse condemnation has grown substantially, commensurate with litigation in this field, over the past four decades. The Maryland Court of Appeals opinion that is the subject of this petition directly contradicts *Dickinson* and court opinions from at least six other states.

I. The Maryland Court of Appeals' Opinion directly conflicts with this Court's opinion in *United States v. Dickinson*, 331 U.S. 745 (1947).

In *United States v. Dickinson*, 331 U.S. 745 (1947), the Court held that a cause of action in inverse condemna-

tion for the taking of an easement arises, for purposes of calculating the statute of limitations period and assessing damages, at the time the extent of the intrusion becomes known and stabilizes. 331 U.S. at 747-50. Justice Frankfurter, writing for a unanimous Court, held that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, *as between private parties*, a servitude has been acquired either by agreement or in the course of time. . . ." *Id.* at 747-49 (emphasis added).

In contradistinction to this Court's holding in *Dickinson*, the Maryland Court of Appeals held that Electro-Nucleonics, Inc.'s inverse condemnation claim arose "when the condemnor acquire[d] the property burdened by the covenant." App. 4a. Thus, even though the Maryland Court of Appeals assumed that operations in violation of the reciprocal negative easements began in April, 1983, App. 4a, 6a, it ruled that the cause of action arose in July 1980, when site 2 was condemned in an eminent domain proceeding to which Electro-Nucleonics, Inc. was not a party. Yet in July, 1980, the WSSC was not operating its sewage sludge composting facility in violation of the reciprocal negative easements. In fact, despite its earlier representation to a federal court that to operate a sewage sludge composting facility on Site 2 it would have to specifically condemn the property interests of *all* industrial park owners in the reciprocal negative easements, the WSSC not only failed to bring such an action, but affirmatively asserted in 1980, through its filing of the *Frankel* case, that its future operations on Site 2 would *not* violate the reciprocal negative easements. Clearly, the extent of the injury, or even the *existence* of an injury, could not have been ascertained in 1980.

As between private parties, all that could have existed in 1980 when Site 2 was acquired was, at most, the mere possibility that the reciprocal negative easements would be violated at some later date. The extent of the violations, and the number of the negative easements that

would actually be affected, would be unknown at that time. Inverse condemnation liability has *never* turned on hypothetical possibilities or the government's stated *intent*; it has always been based on the actual *effect* of governmental action on the rights of private property owners. *See Dickinson*, 331 U.S. at 747-49; *see also Meigs v. M'Clung's Lessee*, 9 Cranch [13 U.S.] 11, 18 (1815); *United States v. Dow*, 357 U.S. 17, 21-22 (1958); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-04, 1013 (1984). As Justice Stewart explained, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J. concurring).

The Maryland rule impermissibly distinguishes between private and governmental conduct. Between private parties, the statute of limitations period for the breach of a covenant under Maryland law only begins to run when the covenant is first breached. *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480 (1879). When the government is involved, the Maryland Court of Appeals held in this case the cause of action accrues prior to the time the covenant is breached—when the burdened land is first condemned and the government would thus first be *able* to breach the covenant—which creates a distinction between private and governmental conduct deemed impermissible in *Dickinson*. 331 U.S. at 747-49.

The Maryland Court of Appeals acknowledged that it was unable to find any case directly supporting its novel theory. App. 16a. Instead, the court cited nine cases which it wrote "support our conclusion that limitations begin to run when the servient estate is taken for a purpose inconsistent with the covenant, because these cases consider the covenant to be destroyed, or extinguished, when the servient estate is condemned." App. 16a-17a. In fact, not one of the cases cited even addresses the ques-

tion of when a statute of limitations begins to run in an inverse condemnation case.[8]

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[8] *Allen v. Detroit*, 167 Mich. 464, 133 N.W. 317 (1911) involved two suits which were filed *prior* to the time the State began operations in violation of land restrictions. The Michigan Supreme Court's holding that the City of Detroit could not erect a fire house in violation of building restrictions without condemning the property rights of all subdivision owners in the restrictive covenants, 167 Mich. at 475, 133 N.W. at 320-21, simply has no relation to the proposition for which it was cited by the Maryland Court of Appeals.

Raleigh v. Edwards, 235 N.C. 671, 71 S.E.2d 396 (1952) was likewise a case filed *prior* to the time proposed operations in violation of restrictive covenants commenced. The holding in *Edwards*—"that the creation and maintenance of a governmental project so as to constitute a nuisance substantially impairing the value of private property, is, in a constitutional sense, a taking within the principle of eminent domain", 235 N.C. at 674-75, 71 S.E.2d at 399—undercuts, rather than supports, the Maryland Court of Appeals' proposition that negative easements are taken when the servient estate is condemned. In fact, the North Carolina Supreme Court explicitly stated that the proposed governmental project was "not a nuisance *per se*. Therefore, unless and until the [project is undertaken], the intervenors in no event may be entitled to damages for nuisance. This being so, the nuisance defense is premature." 235 N.C. at 677, 71 S.E.2d at 400.

In *Shelbyville v. Kilpatrick*, 204 Tenn. 484, 332 S.W.2d 203 (1959), the City of Shelbyville filed a declaratory judgment action against adjacent landowners alleging that it would not be liable for erecting a water tower in violation of a negative easement. The issue of when a taking would occur was not addressed.

Houston v. McCarthy, 464 S.W.2d 381 (Tex. Civ. App. 1971) was a condemnation proceeding brought to condemn a reversionary interest in property previously acquired by the City of Houston. The case has nothing to do with the rights of owners of dominant estates when a servient estate is condemned, and does not even address statute of limitations questions.

The court in *Adaman Mutual Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960), explicitly stated that *the only issue* raised in the case was whether—not when—a taking had occurred. 278 F.2d at 844. The Maryland Court of Appeals' apparent reliance on federal precedent in support of its holding is thus illusory.

The remaining cases cited by the Maryland Court of Appeals involved claims for compensation for the taking of negative easements

By holding that a statute of limitations for the *per se* taking of reciprocal negative easements on land adjacent to property actually condemned begins to run at the time the government first condemns the adjacent property, rather than from the time it first violates the negative easements, the Maryland Court of Appeals has established a standard that both invites a flood of litigation and encourages state condemning authorities to postpone development of condemned land until after the statute of limitations period has run. Every time property subject to negative easements or restrictive covenants is condemned, the Maryland rule would force all landowners benefitted by the easements or covenants to file suit to toll the statute of limitations or risk losing their prop-

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or restrictive covenants, which were interposed in condemnation actions filed by the State which explicitly named, as parties, the owners of adjacent land benefitted by the easements or restrictive covenants. See *United States* v. *Certain Land in the City of Augusta*, 220 F. Supp. 696 (D. Me. 1963); *Town of Stamford v. Vuono*, 108 Conn. 359, 143 A. 245 (1928); *Horst v. Housing Authority*, 184 Neb. 215, 166 N.W.2d 119 (1969); *Meredith v. Washoe County School District*, 84 Nev. 15, 16, 435 P.2d 750, 751 (1968). In holding that the government could not violate negative easements or restrictive covenants without paying just compensation, these courts did not have occasion to pass on the question of when a cause of action in inverse condemnation would have accrued had the government not chosen to condemn these property rights. Moreover, these cases are not relevant because this Court, in *United States v. Dickinson*, explicitly and unambiguously distinguished condemnation cases from takings where the government failed to file formal proceedings, noting that the government can fix the time of a taking as early as it chooses simply by filing a condemnation action. In an inverse condemnation case, by contrast, the statute of limitations begins to run when the extent of the government intrusion stabilizes. 331 U.S. at 747-49.

The cases relied upon by the Maryland Court of Appeals either pre-date or ignore *Dickinson*. To the extent that the Maryland Court of Appeals relied upon dicta in *Horst v. Housing Authority*, *supra*, and a line of cases not on point, to reach a decision in conflict with this Court's opinion in *Dickinson*, the Court should grant this petition so that state and lower federal courts do not similarly misconstrue the law.

erty rights without obtaining just compensation.[9] Yet many such parties, filing suit to avoid the harshness of the Maryland rule, would likely have their claims dismissed as unripe if operations in violation of the negative easement or restrictive covenant had not yet commenced by the date of suit. *See Pennell v. San Jose*, 108 S. Ct. 849, 856 (1988) (takings claims will not be considered until the injury is clearly established); *McDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (takings claim unripe where extent of regulatory intrusion uncertain), *reh'g denied*, 107 S. Ct. 22 (1986). In many instances, including this case, the government's actual use of condemned property might not be apparent within the limitations period. In fact, the Maryland rule creates a positive incentive for governing authorities to postpone use of condemned land for the entire statutory period, in the hope of denying adjacent property owners the right to prove just compensation.

The Maryland Court of Appeals has thus ruled, in effect, that the rights of third parties can be *extinguished* by a condemnation proceeding to which the third party was not joined, even though the government, in the condemnation proceeding, purports to only be taking the fee estate of the named defendant, and only serves notice on that individual. This is constitutionally impermissible. *See Hansberry v. Lee*, 311 U.S. 32, 37-46 (1940) (rights in restrictive covenants could not be conclusively determined against nonparties in an action in which they

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[9] The Montgomery Industrial Park is governed by a variety of reciprocal negative easements, many of which do not appear to be violated by the WSSC's operation of a sewage sludge composting facility. Rather than bringing an action for violation of the three easements that have been violated, the Maryland rule would force landowners, such as those in the Montgomery Industrial Park, to file suit for potential violations of all of the easements benefitting their properties, even though some might never be violated; some might not be violated for 50 years; and others might only be violated if the State carries forth with its intended plans. Such a rule is untenable, and could result in a flood of litigation.

were not named and received no notice); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 318-20 (1950) (consistent with the requirements of the fourteenth amendment, a person cannot be bound by a judgment, whether *in rem* or *in personam*, if notice of the suit was "not reasonably calculated to reach those who could easily be informed by other means at hand.").

A condemning authority, such as the WSSC in this case, has complete discretion over the nature and extent of the interests it seeks to acquire through condemnation. The courts cannot subsequently increase or decrease the scope of the property rights taken. *Berman v. Parker*, 348 U.S. 26, 35-36 (1954). Once the State chooses not to condemn certain property interests, such as the reciprocal negative easements at issue in this petition, determinations made in the initial condemnation case cannot be used as a bar to the subsequent inverse condemnation suit. *See United States v. Smith*, 307 F.2d 49, 57-58 (5th Cir. 1962) (following *Dickinson*). The Maryland rule, in effect, alters this court's ruling in *Berman v. Parker* by permitting the WSSC—or any condemning authority—to take property interests without due process or just compensation through (1) condemnation of property burdened by covenants, in a proceeding to which notice is only given to the owner of the entire fee estate condemned; and (2) inaction during the entire statutory period, ensuring that any claims resulting from future violations of the covenants benefitting adjacent property owners are time-barred before the condemned property is even developed.

The harshness of the Maryland rule is apparent even in instances where the State does not intentionally forestall operations on condemned land to dispossess a property owner of its interest without affording due process or just compensation. This Court explicitly recognized in *Dickinson* that damages resulting from the government's appropriation of an easement as a result of op-

erations on adjacent property are not limited to the mere incremental value which the easement adds to the land. Justice Frankfurter explicitly stated that just compensation includes remuneration for those damages caused to the portion of a landowner's property not taken, as a result of the government taking less than the entire fee estate. 331 U.S. at 750-51; *see also United States v. Miller*, 317 U.S. 369, 375-76 (discussing the rationale for awarding severance damages), *reh'g denied*, 381 U.S. 798 (1943); Md. Real Property Code Ann. § 12-104(b) (1988) (codifying the right to severance damages). The Maryland Court of Appeals' opinion in this case reads out of the Constitution a right to severance damages in those cases where the State condemns land but postpones development of the condemned property.[10]

The Maryland Court of Appeals tried to mitigate the effect of its ruling by suggesting that constitutional rights could be vindicated through means other than suits in inverse condemnation. The court held that, while the *remedy* available in an inverse condemnation suit had expired, Electro-Nucleonics, Inc.'s *right* to the reciprocal negative easements had not been extinguished. The court suggested that the WSSC might not actually acquire title to the negative easements until the 20 year limitations period applicable to adverse possession claims had passed, and suggested that an action in ejectment, a bill to quiet title or injunctive relief might be available. App. 13a-14a. The Maryland Court of Appeals also explained that, while the statute of limitations began to run against

[10] In this case, the Maryland Court of Appeals ruled that the statute of limitations began to run when adjacent property was condemned, in July, 1980, even though operations in violation of the covenants did not begin until April, 1983, at the end of the statutory period. In fact, the WSSC's sewage sludge composting facility was only operating at 33% of its projected level by 1988—8 years after the condemnation of Site 2—when summary judgment was granted in the WSSC's favor. The full extent of the injury to Electro-Nucleonics, Inc. had not yet even stabilized by the time the statute of limitations period had run under the Maryland rule.

Electro-Nucleonics, Inc. in 1980, it has not yet even accrued for the other property owners in the industrial park because their right to compensation, as parties to the *Frankel* case, was subject to the Maryland Uniform Declaratory Judgments Act, Md. Cts. & Jud. Proc. Code Ann. § 3-412 (1984). App. 15a & n.4.[11] To the Mary-

[11] Electro-Nucleonics, Inc. was a named defendant in the still on-going *Frankel* case. *See WSSC v. Frankel*, 57 Md. App. 419, 470 A.2d 813 (1984), *vacated on procedural grounds*, 302 Md. 301, 487 A.2d 651 (1985). Electro-Nucleonics, Inc. filed this action, rather than join the other industrial park owners in filing counterclaims in *Frankel*, because, unlike the other *Frankel* defendants, Electro-Nucleonics, Inc.'s claim for relief was based, in part, on severance damages (the cost of no longer being able to operate its specially-designed bio-medical research facility because of the State's operations on adjacent property). In early 1989, *after* the trial court's decision in this case but prior to the time a decision was rendered by the Maryland Court of Appeals, the WSSC moved to dismiss Electro-Nucleonics, Inc. as a named defendant in *Frankel*. Ironically, had the State not done so, Electro-Nucleonics, Inc.'s claims would not yet be time-barred according to the Maryland Court of Appeals, as the *Frankel* case has not yet gone to trial since being remanded by the Maryland Court of Appeals. App. 15a. This result is grossly unjust.

Statutes of limitations are

> designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 311 U.S. 342, 349 (1944). These considerations, however, do not extend to situations where a defendant has had notice that the plaintiff is trying to enforce a claim against it. *New York Central & H.R.R. v. Kinney*, 260 U.S. 340, 436 (1922). In this case, the WSSC has not been prejudiced as a result of Electro-Nucleonics, Inc.'s decision to file a separate suit, rather than filing a counterclaim in *Frankel*. Accordingly, the statute of limitations should not have been applied. *See Gordon v. City of Warren*, 579 F.2d

land Court of Appeals, the extent of constitutional protection afforded its citizens depends, at least in part, on the procedural method chosen to enforce those rights.

This Court, however, has consistently held that the fifth amendment is enforced through payment of just compensation. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("The form of the remedy did not qualify the right. It rested upon the Fifth Amendment"); *Dickinson*, 331 U.S. at 748 (the Constitution itself, and not merely The Tucker Act, compels payment of compensation when property interests are taken); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (the fifth amendment is self-executing with respect to compensation).

II. The Court should grant this petition in view of the panoply of timing issues raised by the Court's recent decisions relating to *per se* and non-possessory takings, and distinguishing between temporary and permanent takings, the length of time which has elapsed since *Dickinson* was decided and the need to harmonize conflicting state court opinions.

Landowners in the State of Maryland should not be entitled to fewer constitutional rights than citizens of other states. Nor, for that matter, should citizens of other states, whose highest appellate courts choose to follow the 1989 decision of the Maryland Court of Appeals in

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386, 391-92 (6th Cir. 1978) (reversing the entry of summary judgment based on the filing that an initial condemnation proceeding tolled the statute of limitations governing a subsequent inverse condemnation claim). At a minimum, the WSSC's denial that its operations on Site 2 would violate the negative easements, in litigation filed in 1980 involving the same parties and same issues, should have estopped the WSSC from asserting this defense. *See Kinney, supra; see also Doughty v. Prettyman*, 219 Md. 83, 93, 148 A.2d 438, 443 (1959) (citing with approval *Order of Railroad Telegraphers, supra* and *Kinney, supra*); *Zipes v. TWA*, 455 U.S. 385, 393 (1982) (because statutes of limitations are not jurisdictional, waiver, estoppel and the doctrine of equitable tolling apply); *Commonwealth v. UEC, Inc.*, 397 A.2d 779, 784-85 (Pa. 1979) (estoppel).

this case rather than earlier opinions from other states or this Court's 1947 decision in *Dickinson*, be denied the same rights accorded other citizens under the fifth amendment. More is at issue in this petition than the rights of a few landowners.

The Maryland Court of Appeals' opinion that is the basis of this petition is *the only* reported decision in this country addressing when the statute of limitations period begins to run in an inverse condemnation case based on the taking of reciprocal negative easements occasioned by the government's operations on adjacent property which was previously condemned. In addition to being the only reported case directly addressing this issue, the opinion, if left to stand, will also serve as persuasive authority on the broader question of when a statute of limitations begins to run in an inverse condemnation case under the United States Constitution. The opinion, however, contradicts this Court's ruling in *United States v. Dickinson*, and is inconsistent with opinions from other state courts that have considered the issue. *See, e.g., McClendon v. City of Boaz*, 395 So. 2d 21, 24-25 (Ala. 1981) (a cause of action for the *per se* taking of property as a result of the State's activities on adjacent property accrues only at the time the taking is complete); *Pierpont Inn, Inc. v. California*, 70 Cal. 2d 282, 449 P.2d 737, 74 Cal. Rptr. 521 (1969); *Hillsborough County Aviation Authority v. Benitez*, 200 So. 2d 194, 200 (Fla. App.) (a cause of action for the taking of an air easement does not accrue until the extent of the intrusion becomes substantial), *cert. denied*, 204 So. 2d 328 (Fla. 1967); *Blasdel v. Montana Power Co.*, 196 Mont. 417, 423, 640 P.2d 889, 893-94 (1982) (a cause of action in inverse condemnation accrues for statute of limitations purposes at the time damages of a permanent nature accrue); *City of Abilene v. Downs*, 367 S.W.2d 153, 160 (Tex. 1963) (a cause of action in inverse condemenation as a result of the government's operation of a sewage disposal plant did not accrue "until there was a

legal injury . . . when, and not until, the operations of its sewage disposal system were such as to constitute a nuisance . . ."); *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 412, 348 P.2d 664, 671 (1960) (an inverse condemnation action brought by a landowner whose property was adjacent to an airport accrued at the time flights started; not when the airport was built).

At the time *Dickinson* was decided the term "inverse condemnation" had not yet even been coined. *See Agins v. Tiburon*, 447 U.S. 255, 258 n.2 (1980), *quoting United States v. Clarke*, 445 U.S. 253, 255-58 (1980). In the years since *Dickinson* was first decided, this Court has substantially elaborated upon the panoply of rights protected by the takings clause. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (a *per se* taking occurs whenever a public body causes or authorizes a permanent physical occupation of private property); *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3145 (1987) (a government intrusion amounting to the appropriation of a coastal easement constitutes a nonpossessory taking); *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378 (1987) (recognizing that compensation may be required for temporary takings). In light of this Court's more recent decisions, distinguishing between *per se* and non-possessory, and temporary and permanent takings, and the number of questions raised by the Maryland Court of Appeals' opinion in this case, there is a compelling need for this Court to elaborate on the scope of its holding in *Dickinson*.

Dickinson has been construed by state courts to apply to both *per se* and nonpossessory takings claims. *Compare McClendon v. City of Boaz*, 395 So. 2d at 24-25 (*per se*) *with Hillsborough County Aviation Authority v. Benitez*, 200 So. 2d at 209 (nonpossessory). The Maryland Court of Appeals in this case distinguished between Electro-Nucleonics, Inc.'s *per se* claim, which it deemed

to be time-barred, and its nonpossessory claim, which was not deemed time-barred.[12] By holding, in effect, that *per*

[12] The Maryland Court of Appeals ruled, on the one hand, that Electro-Nucleonics, Inc's *per se* takings claim was time-barred and, on the other hand, that its nonpossessory takings claim was deficient because it failed to present sufficient proof of damages "at this time." App. 22a. Electro-Neucleonics, Inc. has, in effect, been penalized for filing this suit both too late and too soon. This result is at odds with this Court's holding that a cause of action in inverse condemnation accrues for statute of limitations purposes contemporaneously with a claim for damages. *United States v. Dickinson*, 331 U.S. at 747-50.

In this case, the WSSC successfully used the pendency of its motion for summary judgment as a basis for preventing Electro-Nucleonics, Inc. from conducting tests on Site 2, in accordance with Maryland discovery rules, to measure the extent of bioburden emitted by the sewage sludge composting facility. Notwithstanding its inability to conduct independent testing, Electro-Nucleonics, Inc. did present evidence derived from the WSSC's own environmental tests to support its cause of action for a nonpossessory taking. The WSSC's sewage sludge composting facility has never operated at more than 33% of projected capacity. It is not clear, however, why the State's efforts to minimize noxious emissions during the pendency of litigation should shield it from liability, nor why the projected levels of bioburden emissions could not serve as a basis for assessing damages.

In affirming the entry of summary judgment, the Maryland Court of Appeals relied upon its prior holding in *Maryland Port Administration v. QC Corp.*, 310 Md. 379, 529 A.2d 829 (1987). App. 17a-22a. That same year, however, this Court reiterated in *Nollan v. California Coastal Commission* that the magnitude of mages does *not* affect the determination of whether a nonpossessory taking has occurred. 107 S. Ct. at 3145; *see also United States v. Cress*, 243 U.S. 316, 328 (1916) ("it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."). The elements necessary to state a claim for a nonpossessory taking and the elements of proof necessary to establish damages, remain the principal unresolved issues in light of recent opinions rendered by this Court in inverse condemnation cases. *See* Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses A New Direc-*

se and nonpossessory claims, both arising out of the government's use of adjacent property, may accrue for statute of limitations purposes at different times, the Maryland Court of Appeals invites duplicative litigation. This is inconsistent with this Court's admonition in *Dickinson* that "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation of what is really 'taken.'" *United States v. Dickinson*, 331 U.S. at 749; *see also McClendon v. City of Boaz*, 395 So. 2d at 24-25 (following *Dickinson*, the Alabama Supreme Court concluded that "the cause of action [for a *per se* taking] accrues when the taking is complete.").

If the Maryland Court of Appeals was correct in completely disregarding *Dickinson*, landowners whose property rights to easements are in question may be forced to split their causes of action for *per se* and nonpossessory takings (because the former claim is deemed to accrue when the burdened estate is condemned, while the latter claim arises when operations actually begin several years later). The second case filed, however, might be deemed *res judicata*. *See Dickinson*, 331 U.S. at 749; *see also Annapolis Urban Renewal Authority v. Interlink, Inc.*, 43 Md. App. 286, 405 A.2d 313, 317-18 (1979), *citing with approval Angel v. Billington*, 330 U.S. 183, 190 (1947) and *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see generally* Cleary, *Res Judicata Reexamined*, 57 YALE L.J.

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tion in Land-Use Planning: A View From California, 39 HASTINGS L.J. 359, 361-65 (1988). The Maryland Court of Appeals' ruling on Electro-Nucleonics, Inc.'s nonpossessory taking claim illustrates the need for this Court to specifically address which elements a plaintiff must satisfy to withstand a motion for summary judgment, and the extent to which damages must be shown prior to discovery to satisfy this burden.

339, 342-44 (1948) (discussing claim splitting). If so, is it constitutionally permissible to force landowners to elect between filing a *per se* claim when the extent of severance damages is unknown, or waiting to determine whether, and to what extent, the State operates in violation of the easements at issue, in the hope that damages for a nonpossessory taking exceed the 'just compensation' available in a *per se* taking action filed—and potentially adjudicated—before the extent of damages is even known?

Is it constitutionally permissible to hold that a statute of limitations for inverse condemnation may accrue *prior to* the time damages can be ascertained? The Maryland Court of Appeals has suggested it is, although this Court held in *Dickinson* that the cause of action accrues *at the time* damages accrue. 331 U.S. at 747-50; *see also City of Abilene v. Downs*, 367 S.W.2d at 160 (a cause of action in inverse condmenation does not accrue "until there [is] a legal injury"). These questions are more than academic; they are all raised in the Maryland Court of Appeals' opinion in this case.[13]

The number of inverse condemnation cases filed in state and federal courts has increaserd geometrically in recent years. In view of the complexity of the issues raised in this case, their relevance to a multitude of other cases, and the need to harmonize conflicting state

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[13] Other questions, implied from the Maryland Court of Appeals opinion, may be incorrectly decided by lower courts if this petition is denied. For example, in light of this Court's recent holding in *First English Evangelical Lutheran Church v. Los Angeles*, 107 S. Ct. 2378 (1987), the question arises how the Maryland Court of Appeal's opinion—focused on when legal title to the burdened estate passes to the State—would affect a claim for a temporary taking of negative easements. Indeed, it remains unclear whether a landowner would be required to file one suit or several suits to recover for a temporary nonpossessory taking of easements that preceded the *per se* taking of these easements, or whether the two claims would merge together.

court opinions, Electro-Nucleonics, Inc. requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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August 2, 1989

APPENDIX

APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 58

September Term, 1988

ELECTRO-NUCLEONICS, INC.

v.

WASHINGTON SUBURBAN SANITARY COMMISSION

MURPHY, C.J.
ELDRIDGE
COLE
RODOWSKY
MCAULIFFE
BLACKWELL
ORTH, CHARLES E., JR.
(retired, specially assigned),

JJ.

Opinion by Rodowsky, J.

Filed: March 13, 1989

Appellant, the owner of the fee simple estate in property adjacent to that condemned by the appellee, relies

on two theories to support this inverse condemnation case. The first submission is that the appellee has taken property of the appellant in the form of the benefit of certain restrictive covenants which had burdened the condemned property. On that theory this action is barred by limitations. Appellant also submits that the appellee's use of the adjacent property effects a taking of the appellant's fee simple property, but there is no evidence to support a taking in the constitutional sense. Consequently, we shall affirm the circuit court's entry of summary judgment for the appellee.

This case is an offshoot of the litigation involved in *Washington Suburban Sanitary Comm'n v. Frankel*, 57 Md. App. 419, 470 A.2d 813 (1984), *judgment vacated on other grounds*, 302 Md. 301, 487 A.2d 651 (1985). On July 8, 1980, Washington Suburban Sanitary Commission (WSSC) acquired the fee simple title to a parcel of approximately 115 acres, known as "Site 2," in an industrial park of some 347 acres lying east of U.S. Route 29 and south of Randolph Road in Montgomery County. In litigation involving the disposition of sewage sludge generated at the District of Columbia's Blue Plains sewage treatment plant, which served part of Montgomery County, the United States District Court for the District of Columbia had ordered that a sewage sludge composting facility be located and operated at Site 2 by WSSC.

According to the terms of declarations recorded in the land records in 1956 and 1959, restrictive covenants had been imposed on the 347 acre tract. Those restrictions, in part, prohibited using any of the land for a dump or sanitary landfill, dumping of waste material or refuse, permitting waste or refuse to remain upon any part of the property outside of buildings, and emitting objectionable odors outside of lot lines. The only defendants named in the eminent domain action by WSSC to acquire site 2 were the owners of the parcels comprising that

site. No owners of dominant estates benefited by the restrictive covenants were joined.

On November 6, 1980, WSSC filed a declaratory judgment action (*Frankel*) against identified and unidentified property owners both within and outside of the industrial park, who claimed

> "damages or payment . . . or relief of any kind, purportedly stemming from the violation, abrogation, or non-observance, or the anticipated violation, abrogation or non-observance of record covenants . . . or for a purported 'taking' of property rights or interests without the payment of just compensation, all stemming from the acquisition of [Site 2] for a public use."

The instant appellant, Electro-Nucleonics, Inc. (Plaintiff), has since 1971 owned Lot 6 in the industrial park. That lot is adjacent to Site 2.

In its *Frankel* opinion, the Court of Special Appeals held that the owners of property within the industrial park owned "dominant tenements with respect to the restrictive covenants to which Site 2 was subject prior to its acquisition by WSSC" and that the owners of those properties clearly had a "right to compensation by virtue of WSSC's taking of the property interest which those negative easements represent." 57 Md. App. at 435, 470 A.2d at 821. This Court vacated the mandate of the Court of Special Appeals for want of a final judgment in the trial court. We pointed out that most of the defendants in *Frankel*, anticipating a declaratory judgment adverse to WSSC's position, had counterclaimed for compensation for the taking of the covenants. Applying *East v. Gilchrist*, 293 Md. 453, 445 A.2d 343 (1982), we held that those counterclaims and the request for a declaratory judgment were one and the same claim for purposes of applying what is now Md. Rule 2-602(a). Hence certification of the declaratory judgment as a final judg-

ment was not the certification of an entire claim. This Court's *Frankel* opinion was filed February 7, 1985.

"Instead of joining the other Industrial Park owners in filing a counterclaim in the *Frankel* case, Electro-Nucleonics filed this separate action in inverse condemnation on March 27, 1986." Appellant's Brief at 1. WSSC took no issue with the Plaintiff's spin-off of its claims into this separate action. Procedurally more significant is that WSSC dismissed, without prejudice, its action for declaratory relief as to Electro-Nucleonics, Inc.[1] The relief sought in Plaintiff's separate "Complaint for Inverse Condemnation," as amended, was that a "taking be declared," that "the covenants which are described herein be condemned," and that WSSC pay to the Plaintiff $20 million "as damages for the taking of the covenants."

The two issues on which we decide this appeal were raised in summary judgment proceedings. Plaintiff, in moving for partial summary judgment as to liability, submitted that WSSC's "ownership of and activities on Site [2] violate these covenants and amount to a taking for which Plaintiff must be compensated." Plaintiff also selected the general statute of limitations as the applicable provision and argued that the cause of action accrued on or about April 25, 1983, the date indicated by certain evidence as that on which operation of the WSSC facility commenced.[2] In opposition to Plaintiff's motion,

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[1] Thus, we are not presented with a case involving "[t]he rule precluding a declaratory judgment to resolve an issue when there is pending another action in which the same issue can properly be resolved [—a rule which] is neither jurisdictional nor absolute." Haynie v. Gold Bond Bldg. Prods., 306 Md. 644, 652, 511 A.2d 40, 44 (1986). More generally *see* Dugan v. Howard, 130 Md. 114, 116-17, 99 A. 966, 967 (1917).

[2] The general statute of limitations is Md. Code (1974, 1984 Repl. Vol.), § 5-101 of the Courts and Judicial Proceedings Article (CJ). It reads:

WSSC pointed out that under Plaintiff's theory, WSSC's ownership of Site 2, as well as WSSC's activities thereon, violated the "purported" restrictive covenants and that, under that theory, Plaintiff's cause of action necessarily accrued when WSSC gained title to Site 2 by condemnation in July 1980. WSSC has never formally moved for summary judgment in its favor on the limitations issue, but it is not necessary that WSSC have done so. *See* Md. Rule 2-501(e).

While Plaintiff's motion was pending, *Maryland Port Admin. v. QC Corp.*, 310 Md. 379, 529 A.2d 829 (1987) was decided. Relying on *QC*, WSSC moved for summary judgment in its favor on the ground that "the alleged impact of WSSC's operations at Site 2 on Electro-Nucleonics' property does not constitute a constitutionally-compensable taking of property under Maryland law." (Footnote omitted). WSSC supported its motion with the deposition of Eugene H. LaBrec, Ph.D., Corporate Director of Regulatory Affairs for the Plaintiff, who was designated as Plaintiff's deposition representative.

The circuit court granted summary judgment in favor of WSSC in a ruling from the bench. In addition to those reasons discussed in its oral ruling, the circuit court specifically granted summary judgment based on "any other reasons" which WSSC had raised. The trial judge thereby negated any possibility that he would have exercised discretion to deny summary judgment in the event his more fully articulated reasons for granting summary judgment might ultimately be legally erroneous. *Cf. Metropolitan Mortgage Fund v. Basiliko*, 288 Md. 25, 415 A.2d 582 (1980) (a trial court ordinarily possesses discretion affirmatively to deny a summary judgment in

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"A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."

favor of a full hearing on the merits even though the technical requirements for summary judgment have been met). Here, with respect to a taking of the covenants, the circuit court concluded that "[t]he loss to the property of Electro-Nucleonics, Incorporated was in July of 1980, if at all, when the WSSC condemned [Site 2]." The court said that "the covenants no longer exist as [they apply] to the WSSC property, and [Plaintiff is] not entitled to compensation for breach of the covenant." With respect to Plaintiff's theory that there had been a nonpossessory taking of Lot 6, the circuit court recognized that the complaint had not been based on that theory. Nevertheless, the court ruled that "there certainly is no sufficient showing to establish that the present use by WSSC [of Site 2] is causing an inverse condemnation of [Lot 6]."

We issued the writ of certiorari prior to consideration of the appeal by the Court of Special Appeals.

I

We are able, without a detailed presentation of the facts, to dispose of Plaintiff's claim to compensation based on the taking of its property in the form of the benefit of restrictive covenants burdening Site 2. In this connection we shall assume, as Plaintiff contends, that the restrictive covenants were validly established in the industrial park, that they run with the land, and that the use made of Site 2 falls within the prohibitions of the restrictions.

In *Mercantile-Safe Deposit & Trust Co. v. Baltimore*, 308 Md. 627, 641, 521 A.2d 734, 740 (1987), we acknowledged that "the majority rule in the United States is that a restrictive covenant running with the land is a compensable property right for condemnation purposes." We had "no difficulty, therefore, in concluding that a covenant running with the land ordinarily is a compensable property interest in the condemnation context, at

least to the extent it adds measurable value to the land to which it is attached." *Id.* at 641, 521 A.2d at 741. In the instant case we shall also assume that the covenants at issue added measurable value to Lot 6. Nevertheless, Plaintiff's inverse condemnation claim, based on the theory of a per se taking of a property right, is barred by limitations because, on that theory, the inverse condemnation claim accrued when WSSC acquired title by condemnation to Site 2.

On this appeal Plaintiff submits alternative reasons why instituting this action on March 27, 1986, was timely. First, CJ § 5-101 is said to be inapplicable because it is not a special statute of limitations directly pertaining to inverse condemnation. Absent a special statute, Plaintiff submits that no time bar arises until the inverse condemnor acquires title by adverse possession. In support of this position, Plaintiff cites Annotation, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriation of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner*, 26 A.L.R.4th 68, 73 (1983) and 1A J. Sackman, *Nichols on Eminent Domain* § 4.102[1] (rev. 3d ed. 1985). If, on the other hand, § 5-101 does apply, then Plaintiff argues that the cause of action did not accrue until WSSC began operating the facility on Site 2, an event which Plaintiff places in April 1983. Plaintiff's legal analysis is that restrictions on Site 2 incompatible with the purpose underlying the exercise of eminent domain survived WSSC's acquisition of title and were not breached until WSSC began prohibited operations. Thus, although the Plaintiff could not by injunction prevent the prohibited operations because of their public purpose, it could at that time first claim compensation.

As we shall see below, § 5-101 is intended to establish limitations for actions based on certain constitutional

violations, including violations of due process. We shall further demonstrate that, under the property theory of restrictive covenants on which this claim necessarily rests, Plaintiff's property was taken when WSSC acquired Site 2 by eminent domain.

A

The ultimate foundation of Plaintiff's claims is constitutional. The takings clause of the fifth amendment to the United States Constitution[3] is incorporated against the states by the fourteenth amendment. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, ——, 107 S. Ct. 3141, 3144, 97 L. Ed. 2d 677, 684 (1987). The Court has also said:

> "The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner."

Chicago, Burlington, & Quincy Ry. v. Illinois, 200 U.S. 561, 593, 26 S. Ct. 341, 350, 50 L. Ed. 596, 609 (1906).

The Maryland Declaration of Rights, art. 24 which, prior to November 7, 1978, was numbered as art. 23, provides "[t]hat no man ought to be . . . deprived of his . . . property, but by the judgment of his peers, or by the Law of the land." "Law of the land" its equated with due process of law. *Horace Mann League of the United States of America, Inc. v. Board of Public Works*, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97, 87 S. Ct.

---

[3] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

317, 17 L. Ed. 2d 195 (1966). Maryland Constitution art. III, § 40 also provides:

> "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."

The relationship between § 40 and art. 24 was stated in *Riden v. Philadelphia, Balt. & Wash. R.R.*, 182 Md. 336, 339-40, 35 A.2d 99, 100-01 (1943).

> "It is a fundamental principle of constitutional law that the power of eminent domain is a prerogative of sovereignty and does not require the sanction of the Constitution for its existence in the State. . . . The Constitution of the State of Maryland, Art. 3, Sec. 40, declares that the Legislature shall enact no law authorizing private property to be taken for public use, without just compensation as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation. This provision is not a grant of power, but a limitation upon the exercise of power. . . . Keeping in mind that the rights of personal liberty and private property are held sacred in our government, and the courts never assume that the people intend to relinquish rights so vital to their security and well-being by any general grant of legislative authority or any general expression of the will of the people . . ., we hold that this section of the Constitution unmistakably declares by implication that private property shall be taken only for public use and then only for just compensation, and no private property shall be taken for private use, either with or without compensation, except with the owner's consent. Moreover, the taking of a man's property

> for the private use of another, even with just compensation, violates Article 2[4] of the Maryland Declaration of Rights, which declares that no man ought to be deprived of his life, liberty or property but by the law of the land. Likewise, the taking of private property for private use by authority of the State is a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States. . . . It follows that where an undertaking for which private property is sought by condemnation is intended for private use, the property owner can invoke the aid of a court of equity to restrain the unlawful condemnation."

(Citations omitted). *See also Columbia Hills Corp. v. Mercantile Safe Deposit & Trust Co.*, 231 Md. 379, 190 A.2d 635 (1963); *Lichtenberg v. Sachs*, 213 Md. 147, 131 A.2d 264 (1957); *Easter v. Dundalk Holding Co.*, 199 Md. 303, 86 A.2d 404 (1952).

In the context of a claim for compensation based on an alleged taking by the State in the constitutional sense, it is immaterial for Maryland statute of limitations purposes whether the inverse condemnation claim is predicated on Maryland Constitution art. 3, § 40, on the state due process clause, on the federal fourteenth amendment, or on a combination of some or all of those constitutional provisions. In the inverse condemnation context a statute of limitations specificaly governing a claim based on any one of the constitutional provisions will govern as to a claim based on any or all of the other provisions.

Prior to Ch. 2 of the Acts of the First Special Session of 1973, which recodified certain statutes into the Courts and Judicial Proceedings Article, CJ § 5-501 was, or at least included, Md. Code (1957, 1972 Repl. Vol.), Art. 57, § 1. That section in part provided:

> "[A]ll actions for . . . violation of the twenty-[fourth], twenty-sixth, thirty-first and thirty-second

> articles of the Declaration of Rights, or any of them, . . . shall be commenced, sued or issued within three years from the time the cause of action accrued[.]"

The Revisor's Note to § 5-101, Md. Code (1974), CJ Article at 159, explains that § 5-101

> "is new language derived from Article 57, § 1. Rather than listing the various forms of action, it is decided that a blanket three-year provision, with exceptions for other limitations, be substituted."

Judge Eldridge, writing for the Court in *Widgeon v. Eastern Shore Hosp. Center*, 300 Md. 520, 479 A.2d 921 (1984), traced this history. The inclusion for more than a century in the general statute of limitations of actions based on specific articles of the Declaration of Rights supported our holding in *Widgeon* that this State recognizes a common law action for damages for violations of arts. 24 and 26 of the Maryland Declaration of Rights.

The applicability of § 5-101 is reinformed by the discussion, albeit limited, in our cases concerning the pleading of a cause of action where the theory of the case is inverse condemnation. In *Public Serv. Comm'n v. Highfield Water Co.*, 293 Md. 1, 441 A.2d 1031 (1982), a certified question case, a county sanitary district had taken possession of the property of a privately owned water company. Contemporaneously with the seizure, a circuit court enjoined the water company from interfering with the seizure. When the water company sued in federal court, we were asked whether the sanitary district's taking of possession gave rise to an implied contract to pay the fair market value of the water company's property and, thus, gave rise to an obligation separate and distinct from any constitutional right to fair compensation based on a taking. We answered the certified question, "No," reasoning that "a determination that a taking in the constitutional sense has occurred is a prerequisite to imply-

ing a contractual obligation on the part of a governmental body." *Id.* at 20, 441 A.2d at 1040.

A taking was found to have occurred in *Walters v. Baltimore & O.R.R.*, 120 Md. 644, 88 A. 47 (1913). In response to a statutory mandate that it eliminate grade crossings at certain intersections in Baltimore City, the railroad elevated the bed of the public street and public sidewalk in front of the plaintiff's house. The bridge, although fully on public property, passed within three inches of the front of the plaintiff's home, effectively barred all ingress to and egress from that side of the residence and diminshed light and air in the residence. The plaintiffs sued the municipality and the railroad in a declaration sounding in trespass. The plaintiffs abandoned, however, any claim of a physical invasion of the residence and rested on the theory that the elevated public street was such an invasion of the plaintiffs' rights as to amount to a taking of the residence in a constitutional sense. We described both defendants as tortfeasors and held that the plaintiffs could recover from either or both.

Utilizing as the procedural vehicle for vindicating the underlying constitutional right either an action in quasi contract (under common law pleading, an action for money had and received) or a tort action by analogy to trespass *q.c.f.* is entirely compatible with an action governed by the general three year statute of limitations.

The Court of Special Appeals has held that § 5-101 governs claims for inverse condemnation. *Millison v. Wilzack*, 77 Md. App. 676, 551 A.2d 899, *cert. denied*, —— Md. —— (1989). Couching the action in constitutional terms did not, the court reasoned, change the nature of the action which remained one for damages to be measured by just compensation for the property taken.

At oral argument in this Court Plaintiff placed particular reliance on *Department of Natural Resources v.*

Welsh, 308 Md. 54, 521 A.2d 313 (1986) which was said to illustrate that the statute of limitations for inverse condemnation is twenty years. *Welsh* was not an inverse condemnation case; rather, it was a bill to quiet title. The State had condemned considerable acreage on a forested mountainside in Garrett County. The description of the area taken included land owned by the plaintiff's predecessors in title who had not been joined as defendants in the condemnation suit. The State had not, therefore, acquired by condemnation the plaintiff's interest in the tract. We held that the plaintiff's bill to quiet title, brought some seventeen years after the condemnation, would lie. Implicit in *Welsh* is that the State had not acquired title to the plaintiff's land because the plaintiff had not earlier sued on an inverse condemnation theory.

Our holding that CJ § 5-101's three year period of limitations applies to inverse condemnation actions does not alter this implication in *Welsh*, or mean that an entity enjoying the power of eminent domain can acquire title to property by an uncompensated taking of three or more years duration. The three year statute of limitations simply bars the purported condemnee's remedy by way of an action predicated on the inverse condemnation theory. If there has been a taking, the right to compensation continues unless and until it is extinguished. If the facts of the taking amount to adverse possession, the condemnor will not acquire title and extinguish the right to compensation until twenty years have passed. *See* CJ § 5-103(a); *Ivy Hill Ass'n v. Kluckhuhn*, 298 Md. 695, 472 A.2d 77 (1984) (private parties). The owner whose property has been taken, but whose action for inverse condemnation is barred by liimtations, may, depending on the facts, lose only the option of compelling the public authority to acquire the property upon payment of just compensation. Even if an inverse condemnation action is barred by limitations, the owner who

claims that a taking has been effected may, depending upon the facts, bring an action of ejectment, *Welsh*, 308 Md. at 65-66, 521 A.2d at 318-19, *Dunne v. State*, 162 Md. 274, 291, 159 A. 751, 758, *cert. denied*, 287 U.S. 564, 53 S. Ct. 23, 77 L. Ed. 497 (1932); or a bill to quiet title, *Welsh*, 308 Md. at 65, 521 A.2d at 318; or "the State's agencies could be restrained from appropriating the property unless and until condemnation proceedings in accordance with law be had, and just compensation awarded and paid or tendered," *Dunne*, 162 Md. at 291, 159 A. at 758; *quoted in Welsh*, 308 Md. at 65, 521 A.2d at 318.

Other than § 5-101 there is no statute addressing limitations on actions alleging a violation of art. 24 of the Declaration of Rights or of the other federal and state constitutional provisions implicated in an inverse condemnation claim. Consequently, the general three year statute of limitations found in § 5-101 controls Plaintiff's claim.

B

Plaintiff next contends that, if § 5-101 governs limitations, the claim nevertheless arose when WSSC commenced operations on Site 2. That contention, however, is consistent with the right relied upon by Plaintiff. The predicate of Plaintiff's claim is that the restrictive covenant is property. Those courts and commentators who endorse that analysis, however, conceptualize the taking to occur when the condemnor acquires the property burdened by the covenant. Acquisition of the servient estate by the sovereign is said to extinguish the covenant. At that time the servient estate is no longer burdened by a restriction purporting to prohibit use of the property for the public purpose, and the owners of dominant estates no longer enjoy, and no longer can enforce, the benefit of the restriction against the formerly servient estate. Plaintiff's argument that the accrual of this inverse condemnation claim is postponed until activity takes

place on the servient estate incorrectly seeks to analogize to the situation prevailing between private parties, where, depending on the facts, the timeliness of an action to enjoin breach of a restrictive covenant might well be measured from the date when prohibited activity first occurs. That situation is not analogous to the one at hand, however, because WSSC could only exercise the power of eminent domain for a public purpose, here to use Site 2 for a sewage sludge composting facility.[4]

The American Law Institute's position, set forth in Restatement of Property § 566 (1944), supports that advocated here by WSSC. The rule in § 566 is:

> "Upon a condemnation of land subject to the obligation of a promise respecting its use in such manner as to extinguish the interest in the land created by the promise, compensation must be made to those entitled to the benefit of the promise."

Comment *b* further explains:

> "*Equitable interest in land.* To the extent to which promise respecting the use of land of the promisor may be enforced by injunction, the promise creates an equitable interest in the land respecting the use of which the promise is made. Upon condemnation

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[4] We do not imply that the timeliness of the counterclaims for compensation filed by the defendants in WSSC's declaratory judgment action (*Frankel*) is to be measured from the date of taking of Site 2. The Maryland Uniform Declaratory Judgments Act, in CJ § 3-412, specifically provides:

> "(a) *Further relief.*—Further relief based on a declaratory judgment or decree may be granted if necessary or proper.
>
> (b) *Application.*—An application for further relief shall be by petition to a court having jurisdiction to grant the relief."

Thus, in lieu of counterclaiming, the counterclaimants in *Frankel* could have awaited the final declaratory decree and, if it were adverse to WSSC, could have then sought just compensation in the declaratory judgment action or commenced separate actions for relief based on that judgment.

> of the land for a purpose inconsistent with the continuance of the promised use, the rights constituting this equitable interest are included in the condemnation and the owner of them is entitled to compensation for their taking."

2 *Nichols on Eminent Domain*, supra, § 5.15[1] summarizes the majority view by stating that restrictive covenants "constitute equitable easements in the land restricted, and when such land is taken for a public use that will violate the restrictions, there is a taking of the property of the owners of the land for the benefit of which the restrictions were imposed." Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 Iowa L. Rev. 293, 301-02 (1970) gives the following illustration of the conventional analysis:

> "By way of example, *A*, owner of the benefited parcel, may have the right that *B*, owner of the burdened parcel, shall use his land for no purpose other than for a single-family dwelling. . . . *A*'s loss occurs when an entity having the power of eminent domain acquires *B*'s land for use in some way that violates the restrictive covenant—in the example stated, perhaps, for a sewage disposal plant. Since *A* cannot enjoin the public entity, as he might a private owner of *B*'s land, his contention will be that his covenantal right has been extinguished and taken."

See also 2 American Law of Property § 9.40, at 449 (1952).

We have not been cited to, nor found, any case specifically deciding when limitations begin to run against an inverse condemnation action based on the loss of the benefit of a restrictive covenant. The following cases, however, support our conclusion that limitations begin to run when the servient estate is taken for a purpose inconsistent with the covenant, because these cases consider the covenant to be destroyed, or extinguished, when the servient

estate is condemned. *See Adaman Mut. Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960); *United States v. Certain Land in Augusta*, 220 F. Supp. 696 (D. Me. 1963); *Town of Stamford v. Vuono*, 108 Conn. 359, 143 A. 245 (1928); *Allen v. City of Detroit*, 167 Mich. 464, 133 N.W. 317 (1911); *Horst v. Housing Auth.*, 184 Neb. 215, 166 N.W.2d 119 (1969); *Meredith v. Washoe County School Dist.*, 84 Nev. 15, 435 P.2d 750 (1968); *City of Raleigh v. Edwards*, 235 N.C. 671, 71 S.E.2d 396 (1952); *City of Shelbyville v. Kilpatrick*, 204 Tenn. 484, 322 S.W.2d 203 (1959); *City of Houston v. McCarthy*, 464 S.W.2d 381 (Tex. Civ. App. 1971).

Accordingly, we hold that Plaintiff's per se taking claim is barred by limitations.

II

On its second claim, that the use made by WSSC of Site 2 effects a nonpossessory taking of Lot 6, Plaintiff submits that this record contains sufficient evidence to withstand WSSC's motion for summary judgment.[5] The argument is that pollution created by WSSC significantly impaired Plaintiff's ability to manufacture biomedical products. We do not find evidence of a significant impairment and consequently do not reach the question whether significantly impairing the conduct of a particular business on Lot 6 would effect a taking of Lot 6.

The process conducted at Site 2 by WSSC is described in a report of February, 1987, prepared by the Johns Hopkins University School of Hygiene and Public Health (JHU) for the Maryland Department of Health and Mental Hygiene.

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[5] Plaintiff does not argue that the trial court entered summary judgment without affording Plaintiff a reasonable opportunity to obtain any available evidence.

"Dewatered sludge containing about 15-20% solids and 80-85% moisture is delivered to the facility daily in water-tight dump trucks. The sludge is mixed with wood chips to obtain a combined moisture content of approximately 60%. The wood chips act as the source of organic carbon in the composting process and provide the porosity necessary for aeration. Front-end loaders are used to construct continuous static composting piles on concrete composting pads. Each pad can accommodate up to 28 continuous piles, with each pile approximately 20 feet wide, 100 feet long and 12 feet high. Primary composting operations were initially conducted under a roofed, open-sided structure. In June 1986 the sludge curing operations were moved to this area. In June 1986 fabric sides were added to this structure to help control odor release; no portion of the composting operations has been conducted in the open air since this date.

"To construct a composting pile, an initial layer of wood chips is placed directly over laterally-arranged perforated aeration pipes. These pipes are connected to vacuum blowers and a centralized air collection system. The sludge/wood chip mixture is then placed on top of the wood chip bed and aerated by drawing air through the piles utilizing blowers which are designed to provide up to 3,000 cubic feet of air per hour per dry ton of sludge for a 21-day period. The operation of each vacuum blower is regulated by a temperature monitoring probe in order to ensure temperature control, oxygen penetration and rapid aerobic decomposition, while minimizing odor production. Much of the odorous gases produced in the piles during the composting process [is] withdrawn by the vacuum blowers into the centralized air collecting system, passed through an odor scrubbing system and discharged through a 65-foot stack into the atmosphere. . . .

> "After the 21-day composting period, the piles are torn down, mechanically restacked and aerated by blowers to further reduce moisture content and ease screening of the materials. Restacked piles normally remain on the pad for four to six days. After the restacking operation, the compost/wood chip mixture is transported to an enclosed screening building where the reusable wood chips are separated from the compost material. Screened compost is then returned to the pad for a minimum 30-day curing period during which blowers aerate piles under positive pressure. The final compost product is sold for agricultural and horticultural use."

Record Extract at 140, 143-44.

On Lot 6 Plaintiff produces virus components for diagnostic test kits. Plaintiff had purchased Lot 6, and the improvements then on it, in October 1971. Those improvements were gutted and a containment facility was built, consisting of three separate laboratories, in which the viruses are cultivated. The viruses are grown at negative pressure, that is, at a pressure less than atmospheric pressure, in order to contain the viruses within the laboratories and not to subject the environment to them.

Plaintiff's concern with WSSC's use of Site 2 is that, despite precautions, the negative pressure of the containment area will draw into one or more laboratories whatever the outside atmosphere contains. That may be a contaminant which destroys the production of the viruses to the serious financial detriment of Plaintiff. The cultures could become contaminated by what Plaintiff calls "bioburden," meaning spores and bacteria. Plaintiff's apprehension is that WSSC's adjacent sewage sludge composting facility increases the preexisting ambient bio-

burden and increases the risk of contamination.[6] Plaintiff is particularly apprehensive that the bioburden will be beyond its control if and when WSSC increases operations to the ultimate capacity of Site 2 of 600 tons per day from the present level of 200 tons per day.

To minimize the risk of contamination, each laboratory, *i.e.*, each production line, was built with a separate air system. Air drawn into the laboratory is filtered through high efficiency particulate air (HEPA) filters which screen out particles down to three-tenths of a micron at ninety-nine percent efficiency. The exhaust which is discharged from the building is also HEPA filtered. Plaintiff changes the air in each laboratory twenty times per hour, because of the proximity of WSSC's facility, even though the recommended rate is ten times per hour.

A person who desires to enter a laboratory from an ambient air section of Plaintiff's building must first enter a dressing facility, which is the first negative pressure gradient, where that person changes clothes and gowns. That person then passes through a hallway, which is the next lower negative pressure gradient, before entering a laboratory. The laboratories are maintained at still a lower pressure of .3 to .5 inch water gauge. Plaintiff has been considering building positive pressure chambers, or airlocks, at the outside entrances to its building, but has not done so.

From 1972 to 1984 Plaintiff's facility at Lot 6 primarily had grown viruses for use in tests for hepatitis.

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[6] Although the record is laden with evidence that persons in the neighborhood have complained concerning the odor emanating from the WSSC facility, particularly when the facility first began operations, Dr. LeBrec testified on behalf of Plaintiff that "[o]dors will have no economic impact to our company, absolutely none, because we don't sell from this plant[.] [A]ll this plant is is a manufacturing site that makes a raw material for another site. And so, obviously, odor has no economic impact. Bioburden could."

Since 1984 approximately eighty percent of production is the human immunodeficiency virus (HIV). HIV cultures are continuously harvested on almost a daily basis. The virus is inactivated, tested for quality, and then shipped to another location where the virus is incorporated into a test for HIV antibodies. The test is used to screen blood at blood banks and any facility that draws human blood.[7]

Plaintiff has been unable to build up an inventory of the HIV test kits, primarily because the demand for these blood screening kits is too great. Plaintiff's fear is that the cultures in one or more laboratories will be contaminated and the entire production then under cultivation lost. The concern is that if the Plaintiff is unable to supply customers because production has been interrupted by contamination, the customers will immediately go to other sources and Plaintiff will be put out of business.

On the present record, Plaintiff continues to do business at Lot 6. There is no evidence that it has ever had to close down one of the production lines, or part of one of the lines, due to contamination. Although Plaintiff has a constant program of quality control, there is no evidence that Plaintiff has ever discovered in any of its cultures or, indeed, anywhere in its building, any contaminant which the Plaintiff has been able to trace to the operations at Site 2.

On the other hand, the JHU study sought to determine, in part, the environmental impact of bacteria and fungi released by the composting operation. JHU concentrated its investigation on a common fungus, *Aspergillus fumigatus*, because it is known to occur in large numbers in

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[7] The remaining twenty percent of Plaintiff's production is considered proprietary information and it was not disclosed in the record.

composting operations. The study found that the concentrations were within normal range.[8]

Maryland Port Admin. v. QC Corp., 310 Md. 379, 329 A.2d 829, presented a very similar claim of inverse condemnation. In that case we affirmed a judgment entered by a court as a matter of law for the defendant, notwithstanding the verdict of the jury had been in favor of the plaintiff. That plaintiff had proven that, to some degree, carcinogens were carried in the ambient air from the State's adjacent hazardous waste dumps onto the property where the plaintiff had processed chemicals and, later, packaged for resale chemicals purchased from others. There was, however, no evidence that occupational health standards then in effect were exceeded. In the instant case there is, at best from the Plaintiff's standpoint, a comparable deficiency in evidence of a taking due to ambient bioburden at this time.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

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[8] The normal background concentrations of *Aspergillus fumigatus* are considered to be zero to five hundred colony forming units per cubic meter of air (cfu/m^3). The geometric mean ambient concentration in the communities surrounding site 2 was 3.4 cfu/m^3 and the maximum concentration there was 88 cfu/m^3. The highest concentration detected on Site 2 was 144 cfu/m^3.

[SEAL]

COURT OF APPEALS
OF MARYLAND

Courts of Appeal Building
Annapolis, Md. 21401-1699

974-4331
Washington Area 261-2999

May 5, 1989

David D. Freishtat, Esquire
Larry N. Gandal, Esquire
Ian C. Ballon, Esquire
Shulman, Rogers, Gandal, Pordy & Ecker, P.A.
11921 Rockville Pike, Suite 300
Rockville, MD 20852

Re: *Electro-Nucleonics, Inc. v. Washington Suburban Sanitary Commission*, No. 58, September Term, 1988

Dear Counsel:

Please be advised that the motion for reconsideration filed in the above entitled case was denied by the Court on May 5, 1989.

A copy of the mandate is enclosed herewith.

Very truly yours,

/s/ Alexander L. Cummings
ALEXANDER L. CUMMINGS
Clerk

ALC: bmd
Encl.
cc: Wilbur D. Preston, Jr., Esquire

COURT OF APPEALS OF MARYLAND

No. 58, September Term, 1988

ELECTRO-NUCLEONICS, INC.

v.

WASHINGTON SUBURBAN SANITARY COMMISSION

MANDATE

Certiorari to Court of Special Appeals (Circuit Court for Montgomery County)

September 2, 1988: Motion to correct the record filed by appellant.

September 14, 1988: Order of Court granting above motion.

November 7, 1988: Received letter from appellant requesting additional argument time.

November 10, 1988: Sent letter to appellant denying request for additional oral argument time.

January 17, 1989: Received letter from Richard J. Magid with attachment.

March 13, 1989: Judgment of the Circuit Court for Montgomery County affirmed. Costs to be paid by the appellant. Opinion by Rodowsky, J.

April 12, 1989: Motion for reconsideration filed.

STATEMENT OF COSTS:

In Circuit Court:

Record	$ 50.00
Stenographer's Costs	$ 54.00

In Court of Appeals:

Petition Filing Fee	$ 30.00
Printing Brief for Appellant	254.00
Portion of Record Extract—Appellant	3,057.60
Reply Brief	283.20
Appearance Fee—Appellant	10.00
Filing Fee on Appeal (Court of Special Appeals)	50.00
Printing Brief for Appellee	288.00
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	10.00
Motion for reconsideration	25.00
	$4,008.20

STATE OF MARYLAND, *ss:*

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals this fifth day of May, 1989

/s/ Alexander L. Cummings

Clerk of the Court of
Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

COURT OF APPEALS OF MARYLAND

No. 58, September Term, 1988

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v.

WASHINGTON SUBURBAN SANITARY COMMISSION

CORRECTED

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Motion for reconsideration	25.00
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STATE OF MARYLAND, *ss:*

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court this tenth day of May, 1989

/s/ Alexander L. Cummings

Clerk of the Court of
Appeals of Maryland

[SEAL]

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 13718

ELECTRO-NUCLEONICS, INC.,
Plaintiff,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION,
Defendant.

MOTION FOR SUMMARY JUDGMENT

Rockville, Maryland February 5, 1988

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 13718

ELECTRO-NUCLEONICS, INC.,
Plaintiff,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION,
Defendant.

Rockville, Maryland February 5, 1988

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE WILLIAM M. CAVE

APPEARANCES:

For the Plaintiff:

DAVID D. FREISHTAT, ESQ.
11921 Rockville Pike, #300
Rockville, Maryland 20852

For the Defendant:

RICHARD MCGIDD, ESQ.

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[4] PROCEEDINGS

THE COURT: Let's call the case.

THE CLERK: Civil 13718, Electro Nucleanics versus Washington Suburban Sanitary Commission.

THE COURT: All right, counsel, please identify yourselves for the record.

MR. FREISHTAT: David Freishtat for the Plaintiff and with me Ann Tablosky and Ian Ballon, also attorneys for the plaintiff.

THE COURT: All right.

MR. MC GIDD: My name is Richard McGidd. I am counsel for the Washington Suburban Sanitary Commission. With me is General Counsel, Nathan Greenbaum, and also Carol Zuckerman.

THE COURT: All right, we are here on Plaintiff's Motion for Partial Summary Judgment, and I guess the request is to find that as a matter of law the restrictive covenants are a compensable property right.

MR. FREISHTAT: That is correct, Your Honor.

THE COURT: And—I guess why I am hesitating is that I was contemplating and asking myself, Is the denial of the Motion for Summary Judgment, is the effect of that to say if it is not, if I don't say yes, they are compensable, then it leaves only the alternative that they are not compensable, and then it is in effect granting [5] summary judgment for the defendant.

MR. FREISHTAT: I don't believe so. I think what happens is that it is a question of is it a matter of law that they are compensable. If not, it is a question of fact for the trial.

What I am trying to do, Your Honor, is try and shorten the issues at trial.

THE COURT: Yes, I read the memoranda filed on behalf of WSSC, and I didn't get the impression that plaintiffs were asking for summary judgment that would affect those issues you raised saying that yes, these are covenants, yes, they do run with the land; it is simply saying let's get this issue and find out is, as a matter of

law—or are, as a matter of law, the restrictive covenants compensable to surrounding properties, not owners of the specific property which is condemned.

MR. MC GIDD: May I be heard on that, your Honor—

THE COURT: All right.

MR. MC GIDD: (continuing)—because I think it gets to our side of the case and it make this a little easier.

Our position is simply that there are issues of fact in opposition to the—

THE COURT: I believe plaintiffs agree with you also there are issues of fact.

[6] MR. MC GIDD: Right. In a nutshell, our contention is that in order to—there is a case that has been cited oftentimes, the Mercantile Safe Deposit Case, and that case says that if you have a covenant, it runs with the land, it is enforceable and it is taken by action of eminent domain into a condemnation proceeding, that that is a compensable right and that the owner—

THE COURT: Provided that there is some testimony that that increased the value of the property. If it doesn't increase the value of the property, then it may be compensable but there is no damage.

MR. MC GIDD: Correct. There is no question about that. What we are here about is this. There are two problems that we have:

One is, have the covenants even been breached? We have a major factor dispute, and there are affidavits which in argument—and I don't mean to jump ahead, but that will be a contested issue.

We do not believe that the covenants between the WSSC and Electro-Nucleonics have been violated, and to the extent that they argue they are, we have a very good position that they are not.

The second issue is, has there been a taking? And what determines whether there is a taking, in our opinion, flows from the recent Court of Appeals' decision [7] in the case of Q. C. Corporation versus the Maryland

Port Admininstration, and that, we believe, sets the standard for what constitutes a taking.

In both situations, there is a clear and very definite disagreement of facts over both of those questions, and that is, in essence, our position in terms of the Motion for Summary Judgment by plaintiff, Electro-Nucleonics.

And when I go into argument—I don't mean to jump ahead of Mr. Freishtat, but to vocalize our opposition, we also have—and part and parcel of our case is a Cross-Motion for Summary Judgment against Electro-Nucleonics on the issue of taking and whether their evidence, as presented to the Court in a motion and memoranda, is sufficient to justify a taking under the case of QC versus the Maryland Port Administration.

I don't want to speak any more because I don't want to get out of turn.

THE COURT: All right.

MR. MC GIDD: I just wanted to say that to help Your Honor get a framework of the issues.

THE COURT: What became of Frankel?

MR. FREISHTAT: Frankel is still out there, Your Honor. It so happens that I chose to file a separate inverse condemnation action in the separate caption as opposed [8] to filing a counterclaim in Frankel. Frankel is basically—

THE COURT: Where is it now?

MR. FREISHTAT: It is here in the court, and I believe—go ahead.

MR. MC GIDD: That has been specially assigned to Judge Frosh, and it is scheduled to try in September of this year.

By the way, Mr. Frankel himself dismissed the case with prejudice. I don't even know if Frankel is the right name, but anyway, he is out of the case and gone, but it still is known as the Frankel case and, yes, it is proceeding and yes, there are several parties still in that case, and we have a trial date in September.

MR. FREISHTAT: And this has a trial date in June.

THE COURT: Well, I suspect that the issue, if and when it gets back up before the Court of Appeals, is going to have at least one member of that bench supporting the Court of Appeals decision, unless Judge Atkins has a change of mind.

MR. FREISHTAT: I think Judge Alpert wrote the Frankel Opinion, and he is now in the Court of Appeals.

THE COURT: Who? Judge Atkins. Judge Alpert merely thinks he should be in the Court of Appeals, frankly is a thought in which I would concur. He is a very competent [9] judge.

All right. What would happen if I were to grant Summary Judgment say for WSSC and dismiss the entire suit? That would make it final and appealable.

MR. FREISHTAT: Well, I think the way the motion that the WSSC filed relies solely upon QC Corp. Opinion that came out of the Court of Appeals, one that the Court of Special Appeals is very much in favor of. The Court of Appeals sort of brought it a little bit back to center, but I think that opinion clearly says that it is a matter of fact.

In other words, if there is something which is on the State's property and is going to come over in private property, the question of fact as to whether or not—I don't think that, using that case, you probably couldn't grant them summary judgment as a matter of law because the Court just said a matter of fact.

The thing that is absent from QC that is present here is there was no covenant affecting both properties, and the issue here is, and the sole issue that we are bringing before this Court today is, there is a covenant that affects both—or a set of covenants that affect both properties.

So the question is not a nuisance, as was QC Corp, but a question of a taking of a property right. The element of damages is probably the same in terms of the

matter [10] of proof, but the theory of law and how we got there is decidedly different.

THE COURT: Okay. I will hear any argument. I suggest that I don't know what additional argument they put forth that has not been covered pretty well in the briefs—

MR. FREISHTAT: As I said to the Court earlier this morning, you have got about an inch and a half of papers to look at.

THE COURT: Which, interesting enough, is not an effort to obfiscate things but rather to put it right on what issues are involved, and I compliment counsel on focusing the direction on those issues.

MR. FREISHTAT: I would just as a matter of background state—and I will be brief since the Court obviously has read the many memornda—this is a case that clearly comes out of the WSSC's purchase of a 150-acre site in the eastern part of Montgomery County to construct a sludge composting facility known as Site II.

The property is subject to a set of covenants. The covenants prohibit a number of things—no waste material refuse, no emission of objectionable odors, prohiting a dump or sanitary landfill.

It is the position of the plaintiff in this case that these parts of the covenants have been violated, per [11] se, by the mere fact that the Commission is composting sewage sludge, and no point in going into the definition of terms as they are well-defined in the briefs.

What should be pointed out, Your Honor, is that Electro-Nucleonics is a publicly traded corporation. They have many facilities all over the country. This is one of their labs.

This particular lab is what is called a P-3 Laboratory. They run P-1, P-2, P-3 and P-4. It can be a T-4 Laboratory by changing its operational procedures; no physical change.

P-3 means that there are—air is filtered coming in and air is filtered going out. This is the next to the high-

est laboratory, the highest being injectable materials. What is done here is basic cell research into viruses.

They manufacture viruses for research by other companies. At this plant, they are the second largest manufacturer of the AIDS Tests. They are doing research into the AIDS virus, into other kinds of infectious viruses, and the quality of the air—

THE COURT: Including those caused by sludge?

MR. FREISHTAT: Pardon?

THE COURT: Including those that may be caused by sludge?

MR. FREISHTAT: Well, Hepatitis virus is in [12] sludge and is being studied here, but different breeds of the Hepatitis virus.

The point is that they do manufacture a number of things at this site for testing and research purposes elsewhere.

They have to be absolutely pure. The plant is a special purpose building; it is not a general warehouse building.

If this Court were to hear the inverse condemnation case, we would go out and we would look at the property, and you see this is a different building from anything you have ever seen before.

The quality of the air is critical to the work that is done, and the air—there are limitations that we would show in the trial as to how dirty the air can be so that it can be properly filtered.

There is no 100 percent pure filter that exists today. The Motion for Summary Judgment was filed shortly after the Mercantile Safe Deposit case was decided by the Court of Appeals which, as all lawyers love to do, we love to look at judges who write opinions.

We look at that in court cases that came out this summer, and it is interesting that in the Mercantile case, Judge Atkins wrote the opinion for the Court of Appeals, and in that case, we believe that he found that [13] restrictive covenants are compensable if taken by public bodies.

Judge Atkins cited with favor the Frankel case, which he wrote the opinion in the Court of Special Appeals, reversed in the Court of Appeals for other reasons.

THE COURT: Sort of like professors in college who buy their book that they have written as a textbook.

MR. FREISHTAT: So, of course, we are taking the position, Your Honor, that Judge Atkins, speaking for the highest court in this state, in effect affirmed Frankel by the decision in Mercantile Safe, Frankel being the companion case to this case, the identical same issues, and in the Frankel decision, the plaintiff here was the defendant in that case because WSSC in that case was seeking a Declaratory Judgment that covenants are not compensable as a matter of law.

Judge Mitchell in this court found that they were, and Judge Atkins, in the Court of Special Appeals, found that they were, and this plaintiff was a defendant in that case.

The other issue that we would bring to the Court's attention is that the defendant has pled limitations in their Answer.

We are asking also for the Court to find that limitations are not applicable in this case. It is every [14] evidence that we have been able to ascertain that the plant commenced operation in April 1983.

In fact, although the defendant alleges that the operation began in December of '82, their own two memos that they have attached to their memorandum, the one from John Menke to the Montgomery County Council says that operation began in April of '83 and the John Tompkins Report of Odors said that it began April of '83.

THE COURT: I don't want to cut it short, but it seems to me—I have a problem reconciling all the cases, decisions, the language that they have of the statute of limitations except for when there is a factual dispute, then it is for the tryer of fact to determine, resolve the issue in dispute, often even to the extent that the Court might be satisfied that the Affidavit has no credence at all.

It might think that, but if it is otherwise set forth in issue fact, that is submitted to the tryer of fact. When they make the determination, then the Court determines what it does with the statute of limitations.

MR. FREISHTAT: I understand, Your Honor. The point I wanted to make on the issue of the statute is that this is not a typical court case.

Now inverse condemnation is as akin to a court action as you could possibly find without being there. Here we are getting into the real nitty-gritty of constitutional [15] law.

We maintain that the Commission should have filed an Eminent Domain case condemning these covenants. If the Commission can come back and, by subterfuge or other means, prevent the property owner from filing an inverse condemnation for three years, then they have frustrated the Due Process Clause of both the State Constitution as well as the Federal Constitution.

It seems to me clear that in a clear condemnation action your Adverse Possession Rule takes place. In other words, the State cannot acquire the property until 21 years have passed.

They cannot, by the simple passage of three years of time—and then the question as to when it begins and all the other questions that come about obviate their need to pay just compensation required by the law of the land.

And its seems—you know, attorneys can differ and parties can differ, but we are coming down to a point where it is not parties, it is not attorneys; it is the Government.

The Government clearly has an advantage over everyone else because they can take our property, but they shouldn't be able to take our property, not pay just compensation, and have a period of time as short as the statute is, as they would argue, three years, and be able to [16] to get out of paying just compensation, particularly where the question of when the time starts is in real question and construction.

They didn't acquire the property until 1980. The plant apparently opened, from all the evidence we have seen in independent documents, in April of '83. They can't play around with that time.

There should be—unfortunately, there is no case in point on when the statute runs on inverse condemnation, but the State cannot acquire just the land until 21 years have run. That should be the statute of limitations because there are many cases, particularly in these cases where you have—taking, takings where the state did not take the property physically, where they may be a police power taking or other kind of taking and the property owner may not have been aware of it or aware of his rights for the three-year period of time.

In this case, this is where I really feel that the Commission has overstepped its bounds in terms of it being a governmental agency and it owes a duty to every property owner to treat every property owner fairly within the law of the land.

Other than that, Your Honor, I think, and you said, we have inches of briefs here, and rather than boring the Court going over cases, I think we will just rest.

[17] THE COURT: Let me ask you if I can simplify this. If this restrictive covenant is a compensable property right on adjacent properties, whether it is dominant, subservient to a property or equal property, isn't the damage done upon the severance of the restrictive covenants?

MR. FREISHTAT: The damage is really done at the time that—of the physical violation. We are talking about a diminution in the value of the property.

THE COURT: By virtue of the loss of a covenant, not by the use of the other property.

MR. FREISHTAT: I don't think the market reflects the diminution in value until the violation occurs. We are talking about—you know, when they took the property for a sludge site, the market doesn't reflect that fact.

The market doesn't reflect it when there is construction going on. The market reflects it when the adverse impact occurs, be it odor or a physical activity on the site that is incompatible with the adjoining properties, that is when the adjoining properties lose their value, and that is when the cause of action arises.

Up until that point, it is speculative as to whether the Commission could have abandoned its project.

THE COURT: But that then gives the adjacent propetries a greater and longer lasting right of compensation than that which is given to the property condemned because [18] a property condemned has or if that restrictive covenant that is on the property is held to be a compensable right—and as I have suggested, there must be some testimony that—I guess you get a real estate agent in who says, oh, certainly this property is far more valuable because it has on it a restrictive covenant, and that restrictive covenant, if it is applied only to this piece of property, could have no value, but it is a corollary restriction on the adjacent property that increases the value of the property taken.

So that is the—when they take it, the date of taking determines what the value of that particular restrictive covenant is, and the argument, therefore, must be, hold on, guys, you also have taken away from us that restrictive covenant and that has a market value as of the date of the taking.

Now even if you take it and you could be compensated for it at that time, later on, because of the operation of the sludge treatment plant, noxious fumes, dust, other things come over onto your property, and then you are into the QC Corporation case, which you are seeking to recover now actual trespatory damages, and if you are entitled to recover for those, whatever the law is governed by the QC Case, you may have two compensable rights: one for the severance of that restrictive covenant and, two, now for the actual intrusion into the property.

[19] As I understand, yours is that we wait around, perhaps up till 21 years, and we retain that right of damage basically forever and say, ah, now you are putting your property to an additional use that would have been precluded under that restrictive covenant, that has lessened the value of our property now today, and so we recover the first year of operations, the third years of operations, the 12th year of operation.

Every time that you use your property in some additional manner which has an adverse effect on the property, that damage is attributable to this restrictive covenant, and does it logically follow you can do that?

MR. FREISHTAT: No. I think what you are describing is somewhat modifying the way the law actually is.

When the Government buys the property subject to a restrictive covenant, that covenant covers more than just that property; it covers a larger area. Supposedly that covenant has enhanced the value of all the property.

The Government buys the property and pays the enhanced value, so they are taking the—even though their use may violate the covenant, they are paying the enhanced value.

Now the question is how about the other property owners around the property who also enjoy the benefits of [20] covenant as it relates to each other, but now because the Government has taken it and the Government can operate land in any manner, regardless of private restriction, it may intend to operate contrary to the covenant.

The covenant is still on the land, it is still in the land records, but it has been condemned as to that property alone.

What I am saying is, as a pratical matter, probably the cause of action hasn't ripened until the Government has actually gone in there. It may intend to violate the covenant at some time in the future, but until it does so, I don't think the cause of action has even arisen.

Moreover, it may be even very difficult, if not impossible, to prove (a) the diminution in property value, which is the distinction between QC and this case—QC had no covenant; QC was strictly basically a nuisance case.

In this case, we have a property interest, and because it is taken, and the way the Maryland law is written, all damages that flow from that taking, not only just diminution in value but all other damages, are compensable.

So taking your argument that—let's say it takes six years to build the facility, the property owner would have to file an inverse condemnation if the Commission [21] didn't file first, and normally you sit and wait: all right, when are you going to file, and it would be almost impossible to measure their damages because they wouldn't be able to quantify—they can quantify maybe the diminution of property value, but they can't quantify what the effects on—the severance damages, what is going to be the effect on their property on their own operation, their other damages, as the result of the taking of the covenant and the Government doing a function on that property that may or may not impinge on their own property.

In other words, the causes of action, their ability to prove damages, the Government has so many advantages over the private property owner in eminent domain.

By taking your argument, it is giving them one more. They are able to force the property owner to litigate the manner before they have fully realized their damages, whether it is a three-year—I mean, we believe we have dealt with the three-year rule. We filed in time. Every indication is they opened up for business and started doing sludge composting in April of '83, and we filed in March of '83.

But the point is, you can't quantify your severance damages until you have got the activity going on and

you can measure it, in this case measuring what are the pathogens in the air caused by the plant.

[22] QC is a very different case from this one here. QC is simply, plainly a nuisance case. This is the taking of a property right, a noninvasory taking.

I don't know if I've answered your question or not.

THE COURT: No. All right.

MR. MC GIDD: Your Honor, thank you. For the record, Mr. Richard McGidd for the Washington Suburban Sanitary Commission.

I would like to start off with a very strong disagreement I have with counsel for Electro-Nucleonics. QC is not a nuisance case whatsoever. If you read QC, it is an inverse condemnation case.

It represents the latest word from the Court of Appeals just what constitutes a taking as a matter of law. What is the quantum of evidence that must be shown in order to sustain a claim for a taking in the sense of an inverse condemnation.

In QC, what was happening was that there was dust of a carcinogenic nature—it was hexavalent chronium that was blowing across private property owned by an adjacent owner to a hazardous waste dump owned and operated by the Maryland Port Administration, and the question was, the adjacent landowner said this dust is coming all over my property, it is creating a hazard, it is dangerous, it is [23] a nuisance, my property is being condemned by this repeated activity that is going on next to me, and this property is owned by the State, and they sued—they meaning the QC Corporation—sued the State and said you have taken my property, and the Court of Appeals addressed the issue: what quantum or what degree of conduct is necessary to constitute a taking, and that becomes a very key issue in this case and one that we feel that the Court of Appeals has laid out what the law is.

In order for there to be a taking for the purposes of inverse condemnation, there must be one—and this is

stated in the decision itself—there must be a physical invasion is one possible test, where actually the Government comes in and physically takes possession of property. That is Situation One.

And on Page 402 of the QC Corporation decision, the Court also says that you can have a taking but only where there has been a substantial impediment or a prevention of the operations of the business activity on the private property adjacent to the Governmental property.

And the question is—and what happened in QC was that a Judgment NOV was issued. The case went forward to trial before Judge, I believe, Hammond in the City of Baltimore.

THE COURT: NOV because of a hung jury.

[24] MR. MC GIDD: Hung jury, and the judge entered an NOV. It never went to the jury. So we have a judge entering a decision here without the jury, without benefit of a jury decision.

He took the case away, in effect, from the jury. There was no jury decision. And he entered a judgment. And this judgment went all the way up to the Court of Appeals, and they sustained the judgment by Judge Hammond—

THE COURT: Including his dismissal of the other three counts.

MR. MC GIDD: That is correct, Your Honor. And they concluded that what happened was the quantum of evidence, the quality of the evidence in the record did not sustain QC's claim for inverse condemnation.

Why? Because, Number One, there was no physical invasion of the property. The Court easily recognized that. And then they turned to the second question: what was the substantial impediment or the prevention of the business operations of QC?

And they looked, and you go through the facts here, and the Court concluded even though some of this material was carcinogenic, people would wear masks, people could go around and their business despite what they

noted as a situation where carcinogenic dust was blowing around the property.

[25] Now let's apply that standard to the facts in this case, and we counted we are entitled to summary judgment because of this case.

Your Honor, attached to our opposition to the Motion for Summary Judgment we have included the deposition of plaintiff Electronucleonics' designee deponent, Eugene H. LaBreck.

This deposition was taken on October 13, 1987.

MR. FREISHTAT: Your Honor, the motion that they filed for summary judgment was filed on January 26th.

Fifteen days don't expire until the end of next week. We haven't even filed a response to that. I would ask Mr. McGidd not to discuss that issue until we have had at least a chance to brief the Court on it as well.

MR. MC GIDD: Well, this depositon was filed quite some time ago. With the supplemental? All right. The points are made out, but I am not going to—if counsel insists on that, I will, but for purposes of the Court's consideration, I would like the Court to note certain pages in the deposition which aren't really going to change because the testimony by their designee has been clearly placed on the record, and I would first ask the Court to consider Page 25 of the deposition, and I will just read a section there.

What I will be reading will be evidence which [26] absolutely and positively demonstrates there has been no damage whatsoever to the operation of Electro-Nucleonics.

In fact, they are fully engaged in their business to this date, and they have been impeded to one iota. Let me just show you why I say that, and this is at Page 25:

"To your knowledge, has anyone discovered in any of your cultures or indeed anywhere in your building any contaminants which you are able to trace to the operation of Site 2?

"Answer. Not presently.

"Question. Not to date?

"Answer. We don't know what the organisms are because we haven't done the environmental monitoring to know." Okay?

Let's go on from there. This is on Page 30 of the deposition, and the question is—well, regardless.

"Answer. The problem is not the air that is brought through the filter. As we see it now, the problem is every entry and egress in the building because when you open a door, whatever is in the atmosphere outside is going to be drawn inside because of the negative pressure of that facility, and if the bioburden"—and this is the word 'bioburden'—"is such"—

"Question. Bioburden?

"Answer. That is your spores and bacteria and the [27] things that you are generating over there. If a bioburden becomes unbearable, we might in fact be presented with more problems than we have experienced to date because our understanding is that you are not even anywhere close to operating at the capacity of this facility.

"Question. Do you have any evidence at all, any studies, tests of any kind concerning the amount of bioburden imposed on that facility by this WSSC?

"Answer. No. That is why we are expecting to obtain that evidence because in reviewing your documentation, we are not sure that it is a worthwhile document. We just don't know."

The deposition goes on at Page 48, and the questions are asked: Have there been any increased costs or have you lost any profits, have there been any lost profits.

At Page 58, "As your corporate designee, you are contending that your company has suffered any loss in profits to date as a result of the activities of Site 2?

"Answer. I don't think we can make that statement, no."

Now what we have here is a company that is running full tilt. There is no question that they are in business.

The only suggestion they have is that they may—that they may have any problem with this is that their filtering system is run a little bit more than it has been before, [28] that they have to cycle their air more times because they are concerned that there may be a problem.

We are here on summary judgment. Our problem is this: That if you contrast the Maryland Port Administration versus QC standard against what they are alleging in their facts and what their facts suggest, they can't even come anywhere close to the carcinogenic dust which was found on the neighboring property.

They have a legal argument. They say well, QC doesn't apply because that is just a nuisance case. It is not a nuisance case.

If you read QC, it is an inverse condemnation case that applies in this case. They say it doesn't apply because there is no covenant.

It doesn't matter. The question is whether there is a taking. In fact, counsel describes it that covenants are compensable if taken.

Now you can't take the covenants unless you are impacting or taking the land to which the covenants attach. Covenants just don't circulate in the air. They are attached to interest in real property, as they always are.

If they have a claim for inverse condemnation, they have to be able to demonstrate that the State, through the Government, has inversely condemned their land by taking certain actios consistent with the standards set out in QC.

[29] They haven't done that and they can't do that because what you read in QC sets forth an extremely high standard. The Court of Appeals has made it very clear. And this Court of Appeals' decision isn't out there by itself.

I would refer Your Honor's attention to the Supreme Court decision which is also referenced in the QC case called Penn Central Transportation Company versus City of New York, and this is a decision by the U.S. Supreme

Court which, in effect, foretold the decision by the Court of Appeals in QC.

It basically sets out an exertmely high standard that plaintiff must show to demonstrate that there has been a taking.

In this case, the evidence comes nowhere close to QC and nowhere close to Penn Central. The point is that if there business is going along full tilt, if they are operating, if they have not had their property invaded, if they haven't had it so seriously—their business prevented or so seriously impeded as was even indicated in QC, they don't have a cause of action.

The notion of taking is an extremely significant act. Inconvenience, nuisance and so forth are not sufficient to constitute a taking, and if you take a covenant or if you take land, that taking standard in QC is going to apply.

[30] The taking of any interested real property is determined by the language of the QC Corporation case. That is our primary position with regard to our Motion for Summary Judgment and as well as our opposition to their motion.

I would point out the second facet of our argument deals with what Mr. Freishtat rather blithely referred to as the covenants are violated, per se. We say that is nonsense.

Those covenants are not violated. We have not violated those covenants and we can demonstrate—we have demonstrated in affidavits that they are not violated.

Let's look at the covenants that they are talking about specifically, and there are three of them, three covenants.

The first one says no waste material or refuse may be dumped or permitted to remain in or upon any part of a property outside of buildings.

Now the evidence—and this is stated in the affidavit of Mr. Murray, which is attached to our opposition, and I would point to Paragraph 10 of his affidavit, from the time that operations began at the plant in December of

1982, no waste material or refuse has ever been dumped or permitted to remain in or upon any part of the property of Site 2 outside of any building, and the reason why is [31] everything is done indoors.

THE COURT: Suppose that it was. Just assume for a second that it is. Are the covenants enforceable any longer?

MR. MC GIDD: Well, we contend—you know, it would be our position that the covenants in this situation would not be enforceable.

THE COURT: That is what I am getting at. When you took the property for the governmental purpose--

MR. MC GIDD: Right.

THE COURT: (continuing)—apparently it is acknowledged before the federal judge that this purpose might ultimately violate the restrictive covenants. Indeed, as soon as you are start, you are putting a use that was restricted by the covenant.

MR. MC GIDD: Right.

THE COURT: All right. So you would, therefore, I guess, acknowledge that when you took it, it did in fact sever the restrictive covenants, they cannot be enforced against you by the remaining property owners on Site 2.

MR. MC GIDD: Yes, we would agree with that.

THE COURT: Okay.

MR. MC GIDD: Our position is that the covenants were not violated because when the representations were made to the court and to various courts, and Your Honor has read [32] them.

They suggest these are admissions. What they are are statements by counsel in various documents—most of them are by lawyers, all of them are by lawyers—

THE COURT: That and opening statement are few chances that the lawyers gets to testify.

MR. MC GIDD: Usually not well either, but the statements were made in 1979 and 1980, and that was three years before the facility even began, it would be began the facility began operation.

It was before the land was condemned. It was before the facility was built. It was before the facility went into operation.

Certain lawyers—and they were honestly concerned that we would be in violation of the covenants, but the one factor that is overlooked here is the technology.

Since 1979 and '80 when these statements were made, we poured in excess of $15 million into that facility, to take it from what was a rather basic facility for composting into what is now one of the leading facilities in the country and one of the top facilities in the world.

It is considered one of the very best and something—I don't know if you are proud of composting facilities, but it certainly is a facility—

THE COURT: I am not really into that.

[33] MR. MC GIDD: Right, I wouldn't imagine. But it is a facility that we have poured an enormous amount of technology and development into. We have recognized it has been a problem or would be a problem from the beginning.

It was not a mystery to us. We never tried to hide it from anyone. But we have done is applied technology. By the time the project, the composting facility started, the design of it, from the point in 1979 when these statements were made till the time it started up years later was completely changed, revised, everything was under roof, under and enclosed. We put on enormous scrubbers and blowers to take care of the odor problem.

What you have now is a plant that is nothing like what it was when the representations were made by Mr. Von Kann and by other counsel, Mr. Hefrin and so forth.

They honestly believed, and with good reason, that there was a concern that the covenants might be breached.

At the time that this suit was filed—and that is what this case is about—is about when this plant is operating, we have a different type of plant, and our position is that what are trying to be passed off as admissions are really predictions and opinions by counsel made well before the plant even got going.

So it is our position that the arguments that [34] there is a violation of the covenants per se is just not true. There is no such thing as thing.

These covenants are not violated. Assuming that there are viable, they have not been violated, and there are affidavits to that effect.

Now let's talk about the main covenant problem which is most on the minds of everyone, and that is the odor problem, and interestingly, in the deposition of Mr. Eugene LaBreck on October 13, 1987, we asked about the odor problem and its relationship to Electro-Nucleonics, and at Page 42 he was asked, "Do you as part of your case intend to raise any issues with regard to odors from Site 2," and the answer, "Unless I were convinced that the odors contained some toxic vapor, I don't think odors are really a problem with us. One always is concerned that what you might smell may have something in it you might be concerned about, but when I went to school, I lived near Oscar Meyer Plant in Madson, Wisconsin, so I can tell you odors are obnoxious, but I can live through those.

"Odors"—and then this is the most important part of it all—"Odors will have no economic impact to our company, absolutely none, because we don't sell from this plant. All this plant is is a manufacturing site that makes a raw material for another, and so obviously odor has no economic impact."

[35] Now our covenant, to the extent that this covenant may be viable, speaks to the issue of odors which are objectionable off the lot line.

THE COURT: Which covenants may be viable?

MR. MC GIDD: I said to the extent that this covenant might be—they might argue that it is viable, even if it were viable, we would contend that it has not been breached nor has there been any evidence from their side that any odor problem causes any problem to them.

They just stated through their designee odor is not a problem to us, and so even if you assume that the cove-

nant was breached, they haven't been damaged because odor isn't a problem.

THE COURT: I didn't understand in their claim anywhere they suggest that you have breached the covenant.

MR. MC GIDD: But there has to be a particular covenant. They have to put their finger on something.

THE COURT: They are suggesting that you breached the covenant, if it were still in existence.

MR. MC GIDD: Right.

THE COURT: But it is not in existence.

MR. MC GIDD: Right.

THE COURT: You have taken it.

MR. MC GIDD: That is right. That is what they, in effect, are contending. We are taking the position that [36] even if it were in existence, we weren't breaking it because, first of all, odor is not a problem for them. They are saying that you breached the odor covenant, and then they turn arounds and say, well, odor is no problem to us, anyway.

What their problem is is they are concerned about biomass or bioburden, spores and funguses. There is no covenant that prohibits that, and there is nothing—

Now what they do at their facility—they don't like what we do at our facility because they think it causes a problem to them; we don't like what they do at their facility.

Your Honor knows that they grow live AIDS Virus in their facility. That is what they grow. Our product is making compost; they grow AIDS Virus, and they grow it in leukemia.

They raise leukemia and they grow AIDS Virus. They are not a great neighbor either. It is the pot calling the kettle black.

Nobody—we just are too—maybe we are a match made in Heaven; I don't know, but the point is, we don't particularly like—

THE COURT: You deserve each other?

MR. MC GIDD: Deserve each other. We don't particularly like what they are doing there, and we wonder whether they are violating some of the covenants with what [37] may be going outside of their facility.

THE COURT: Suppose—assume for a moment that whatever it is that they may be doing does, in fact, cause —would be in violation of the covenants prior to your taking it as a property. Could you enforce them?

MR. MC GIDD: I don't know the answer to that, Your Honor. I would have to look into that.

THE COURT: If I knew the answer, I probably wouldn't have asked.

MR. MC GIDD: I just don't know the answer. But our position is that if even assuming that these covenants are effective and in force against us, these are not what —they are not complaining about anything that is covered by the covenants.

They don't like some of these spores and fungal or whatever material they claim is being emitted from our facility. But we have two problems with that:

One: Their own testimony is that they have no evidence that any of that material that comes from our site is getting onto their property at all.

That is what I just read before. There is no evidence that anything from Site 2 has gotten into their building or anywhere on their property.

They don't have any—there is no evidence of that.

Two: There is a covenant against odors, but [38] odor doesn't bother them.

They have just admitted that in their designee deposition. What is bothering them are spores and biological matters that they claim may be coming—they have no evidence of that, that it is coming across or, on top of that, there is no covenant against that. Covenants are read restrictively.

If you have a covenant against odor, it means odor. It doesn't mean fungal spores, and it doesn't mean pollen

and it doesn't mean something else; it means odor, and odor doesn't bother them. They have admitted that.

And now they have got something else they claim: the bioburden. They don't have any evidence that any of that has gotten onto their property.

Now only is that not a taking within the meaning of QC; it is not even a violation of any covenants that might have even been there.

THE COURT: I think you put your finger on what appears to be in some dispute—your suggestion that you have the state of the art plant, the greatest thing in the world that procduces the best product that could possibly be done, and they still look up it as a product that is something that you avoid stepping in.

MR. MC GIDD: Well, compost—we sell it in bags. It is called Compro. You see ads for it around, [39] and people use it for fertilizer.

THE COURT: I understand.

MR. MC GIDD: I have nothing further, Your Honor.

THE COURT: Mr. Freishtat, are you still bound by those covenants?

MR. FREISHTAT: That is a good question. The courts in Maryland clearly have said that the covenants like this—homeowners' covenants or whatever—are to foster a scheme.

Clearly, before WSSC came in here, any property owner could enforce against any other property owner. Now if somebody had come into the park, the industrial park, who is immune from enforcement of those covenants, they have, in effect, taken them but the covenants are still there on the land records, if they were to leave, I think the covenants would still be on the property.

In other words, they, because of their peculiar governmental status, cannot be sued by us, for instance, to make them conform to the covenants.

THE COURT: Can they, in turn, make you conform?

MR. FREISHTAT: I believe they can because the covenants are still in the land records. They haven't

taken—we argue that they have taken, but they have not formally gone in and filed a petition and removed the covenants, removed our title to those covenants at this [40] time.

I think another property owner in the park can sue one private property owner to enforce the covenants as it is between them.

A private party cannot sue WSSC to enforce a covenant, that is clear. I think the Commission, because of its property, its title to the property, can sue another property owner to enforce the covenants.

THE COURT: Well, then, when do the covenants or the scheme become broken to the extent that they are no longer mutually enforceable?

MR. FREISHTAT: That is where I am sort of fuzzy. It is clear that if a property owner violates the covenants for a long enough period of time and the scheme is broken, then the courts will refuse to enforce the covenants.

THE COURT: Although they remain on the land.

MR. FREISHTAT: They remain on the land. The Court can refuse—will the Court refuse to enforce the covenants because of WSSC's presence there?

THE COURT: You are in agreement that WSE's covenants are not enforceable against WSSC?

MR. FREISHTAT: Clearly.

THE COURT: Okay.

MR. FREISHTAT: Clearly. I think that is a question of fact as determined by the impact of the [41] Commission's operations on some of—some of these properties are fairly remote, a quarter of a mile away from the Commission's operation.

The Court may find that in that area those covenants will still be enforceable.

THE COURT: I wasn't clear on that from Judge Atkins' opinion on the Court of Special Appeals. He referred to Petersen and some other people, that Judge Mitchell had not made a finding of fact.

Were those property owners—I wasn't sure whether Judge Atkins was saying in addition to the owners of the dominant and subservient land governed by these covenants, that adjacent property owners, whether they are a part of the mutual restrictions may—

MR. FREISHTAT: The covenant refers to the general neighborhood.

THE COURT: They what?

MR. FREISHTAT: The covenants are binding on the property, the adjacent property and the general neighborhood. Three of the—there are three intervenors who live across Route 29.

THE COURT: But aren't part of the restrictive covenants?

MR. FREISHTAT: Their land was not part of the restrictive covenants. They were intervening because they [42] claimed to be in the general neighborhood.

Going back in history, when the property was rezoned in 1956—

THE COURT: Okay. I just—I have a great deal of difficulty seeing where, other than by Judge Atkins' opinion, restrictive covenants are extended to people beyond the land to which the covenants attach.

MR. FREISHTAT: I have got a problem with that, too, Your Honor, but thank God—we are on the property. It is clear that we are there. Clearly there are three different covenants that comprise the industrial park and they are all identical in their scope. So they all cover the scheme. Clearly the scheme that is referenced in the Court of Appeals' opinion covers our property, their property and the other properties in the park.

Now to talk about somebody's across the street in a single family house, they are arguing—their point is that they were opponents in the zoning case and these covenants were put on the record to satisfy their concern. That is where they come from.

Anything further?

MR. FREISHTAT: Well, I just wanted to point out that the Commission's arguments seem to be very spe-

cious in that they are picking pieces out of the whole that satisfy them and ignoring the other elements.

[43] There are in this case because of the covenants two elements that have to be considered: One, diminution of property value, which is something that is to be testified to by a land appraiser, real estate agent, whatever, and then the effect, because you have a partial taking, a taking of a part of those bundle of rights, you have consequential severance damages, which would be not just the loss in value because of the actual operation, taking of the covenants, but also the consequential damages, the loss to the property, the severance, and there are two elements.

QC only had one element; this has two elements. Mr. LaBreck was testifying as to one of the elements, his diminution in value because of his operations, but there is a diminution in value to the actual real estate, the actual realty.

What we are asking the Court today is to get over one basic hurdle and that is, as a matter of law, (a) covenants that are violated by the state or taken by the sovereign and (b) that these particular covenants, the provisions are violated per se as a matter of law by the composting of sewage sludge.

We have got a lot of case law in here holding that sewage sludge is waste. It has been decided in a number of courts throughout the country that that is a violation of the covenants.

[44] And then we will have to go to trial on the question of what are the damages that flow from those two points. Thank you, Your Honor.

THE COURT: I really have some difficulty with the logic or the thinking of some of these courts' decisions. Let's see if I can put it and simplify it. I have two cups here, the two pieces of land, Cup A and Cup B, and there are restrictive covenants filed—they originally are one cup, and I want to create two cups, and in doing so I put restrictive covenants on each of the cupts so that

neither will interfere with the use and enjoyment of the other.

I record them, and we now have the restrictive covenants. Along comes the government and comes up to Cup B and says, "I'm sorry, Mr. Owner of Cup B, you are going to have to get off, we now want to use Cup B, and we are not going to use it for what you have; we are not going to turn it upside down, which violates the covenants, and use it for, instead of putting something in it, covering something."

And the owner says, "All right. You have got to pay me for the taking of my cup." "Well, of course we do. That's eminent domain, here's your money. Wait a minute. You see, a valuable right that I had was that I could keep Cup A from turning over his cup, which would have affected me, so my property is worth more by virtue of the fact that I have that covenant over here, and the Court of Appeals [45] has said, yes, that—the restrictive covenant is or may be a property right that increases the value. So we have to pay you more than what the mere market value would be because there is a contractual right that is compensable."

And so now I get my money. Now Cup A is sitting over there and he says: Hold on. You have breached a contract right, not on the property of Cup B, which the prior decisions have said—if Cup A has an easement over that land, it doesn't mean that the government has to pay twice; it means that they have to compensate all of the parties who have an interest in the property of Cup B for their interest, which includes the owner of Cup B and whatever the value of that easement is over Cup B.

Relatively new—totally new, it appears, is the Frankel argument where Cup B says—I mean, Cup A says, "Wait a minute." And let's add another thing. You had the restrictive covenants and Cup B also had an easement, and he comes in and says: Hold on, government. Look, you are taking—Cup B, you have taken an easement I had on the property and also I had a more valuable

piece of property because I had that covenant. So I am entitled to same amount that my property, market value of my property has been diminished by your extinguishing the covenants.

And prior to Frankel, WSSC's answer would be—and the law seems to say because it is the only thing they [46] dealt with was the property being taken, the cup being taken—would have said, "Owner of Cup A, you are right. Here is your money for the easement," not paying twice, but they are compensated for the easement on the property plus the fair market value of Cup B.

The only thing is, the owner of Cup B only gets the fair market value less the easement. The value of the easement goes to Cup A.

Now Frankel says, well, gosh, we are going to extend it. You get the increased value of your property. Now we have to go over and compensate somebody else for a contract right that has been severed and which Cup A no longer had, and the simplification of the holding by the Court of Special Appeals is yes, that is a right never recognized before because he is using the language that refers only to contractual rights in Cup B, not contractual rights that are over in this other property, and so the effect of Judge Atkins' decision is: We are extending it outside of the actual property taken. In effect, consequential damages—in the nature of consequential damages, if a portion of the property is taken, as to how it affects the balance of the property to one owner, but also any consequential damages to property that is not being taken from a different owner and, to the best of my knowledge, never granted in any courts of this state. [47] And then apparently, as I said, I have some difficulty with what he is talking about with the people that the couldn't tell who they were or whether they constituted adjacent owners.

And I have a great deal of respect for the intellect and knowledge of Judge Atkins, but I can't understand at all how he determines that adjacent properties who do not

have—for which there is not a reciprocal right of enforcement of these companies, the spokes of the wheel expand out also to them, who say: hold on, you know, as long as these people over at Cup B couldn't use—put his cup upside down, my property was more valuable over here because a lot of people come in and they want to buy my property and said, you know, it's really a great piece of property here, and not only that, but see that over there: Cup B can't put it upside down. And he is going to say: we are going to compensate them for diminution in market value and, you know, despite the desire maybe to compensate anybody who has a diminution in their property value, I fail to see the distinction between that rationalization and one in which rezoning a government function of land causes a diminution of adjacent property for which they are not compensated.

If townhouses or an apartment building goes up over here and as a result of that the residential neighborhood [48] property is not—they don't get compensation for that, and I don't see any rational basis for extending it in this case when they are similar.

So now we come back—and I don't have to go to the adjacent owners because they are not before me. I have really gone far beyond this in looking at Frankel and saying—

So we come back and I see three causes of action that are possibly embodied in this one complaint, although labeled only one of them, the first being—and I would like to narrow specifically in my opinion what Frankel was about, and Frankel is simply if you sever the contractual relationship between two pieces of property, two separate property owners, whether you call them dominant and subservient or mutually dominant and mutually subservient, mutually restrictive as to one, mutually enforceable between them, if you sever that, is that a severance of a contractual right which is compensable when property is taken under eminent domain, not from the owner of Cup A?

Frankel seems to state clearly: yes, it is. Judge McAuliffe has, in his concurring opinion of QC—wait a minute. Strike that because I don't want to get there yet, although he refers to it as inverse condemnation. I would like to call it instead—as soon as I do that, there already is a determination, but I find it [49] more descriptive to say what is being sought is compensation—well, it is. It is compensation of the neighboring property of a different owner because of the loss occasioned by the unenforceability now of the restrictive covenants.

You have conceded that the covenants are no longer restrictive. I guess the law can always be changed, but it would seem to me that under the existing law as it has come to us for years and years and years is that when that scheme is broken, the covenants are no longer enforceable, and you would have to now carve out an exception or a different rule saying that they may be severed and no longer enforceable; however, if the cause of that violation of the scheme ceases to exist, the covenants then become enforceable again, and that has never been the law.

Once they are broken, they are no longer enforceable. The fact that subsequently the cause of that break abates doesn't mean that they come back into effect. As you said, they are still on the books but they have been broken. They are no longer enforceable, and the lack of enforceability endures for—they are gone, in effect. And it would seem to me that the same thing would be true here.

If a successor to WSSC comes in, they sell the property to them, it just doesn't seem under the law—you can't have it just sort of waiting out there to hit [50] you sometime in the future, that they now would revert back and be enforceable.

So I don't know what the Court of Appeals is going to do when they get this issue, and I hope they will look at it, you know, in this light precisely as it is consequential damages to a neighboring property owner, not

because they have taken any of their property, but because it severed that scheme.

Let's see where that could extend. Suppose you have a subdivision with restrictive covenants that nobody can build a fence. Three people build fences in their houses and nobody brings an action to enforce the covenants, and the time comes that number four tries to do it and they bring the action and they say no, the scheme has been broken, they are no longer enforceable, so the property owners then come back and sue all four of them for causing the breach of the covenants, not to enforce the covenants, not to sue for damages because they have been breached, but because you have taken away an increased value of our property.

I recognize that that is not a good analogy because you say well, it was by your own inaction that caused it, but I use it only for illustrative purposes.

Now we are coming back, where are we on your particular case, and you have said—you have taken the [51] property, you have severed the covenants. The law says that you are entitled to any value that was—enhanced value of your property by virtue of the covenants. We now want our corresponding value on our property.

And that, in my opinion, is as far as you can go on your complaint. It is the loss of that covenant, not to what use they put their property to that violates if it were in effect.

So it would seem to me that the only element of damages under your complaint would be any decrease in market value by virtue of the loss of the covenant that was a contractual right on your land.

So your next step then is, but wait a minute, you are using the property in violation of the covenants, I recovered only that contractual right.

You still would have two causes of action left to you, possibly, which I find apparently Frankel combined all of the things into one. So we come back to nuisance.

Well, it is not a nuisance suit, and indeed nuisance may be gone because even if it might constitute a nuisance, can you abate that nuisance, do you have a right of action to stop them from using the property if in fact it was a nuisance.

QC seems to say no. This says no. And that is why it is not a nuisance suit because you don't. Now we [52] come to inverse condemnation different from the taking of the property next to you, and that is the use of the property it put to itself to the extent that it causes inverse condemnation, and that then now would bring you solely into the Maryland Port Administration versus QC Corporation.

After this rambling dissertation, this is my analogy of the case, that I will deny the Motion for Summary Judgment in favor of the Plaintiff, I will defer ruling on WSSC's Motion for Summary Judgment until you have had an opportunity to respond.

Somebody else may hear this and may come from an entirely different direction than I have, but let me suggest to you that what my inclination would be, subject to being convinced otherwise—and certainly I would keep an open mind to be allowed to be convinced—I would far prefer to be convinced I am wrong at this level than have you prove me wrong in the Court of Appeals where it is published for everyone to see.

So, you know, that attorneys who think that, hey, he has already made up his mind, I am not going to change it are definitely wrong.

We far prefer, at least I would, to have it changed here, turn off the record and say, "I'll admit I'm wrong, but I'm not going to do it publicly" and then put it [53] back on the record.

My inclination, as I started to say, would be yes, there is a right of recovery for inverse condemnation. That right of recovery would not extend to the loss of a re-

strictive covenant of the land—to the owner of the land not condemned.

Let's use the analogy, in my opinion, the law as it exists today is that—setting Frankel aside from the Court of Special Appeals—is that when the restrictive covenant was broken by WSSC on Cup B, the value of that covenant that may have been on Cup A, your property, is no different situation than had the property been rezoned resulting in a diminution of value because of your right to ensure the department buildings could not have been on Cup B and, therefore, you may have lost a contractual right, but it wasn't your property that was condemned.

Your rights to enforce that contract no longer exist, but it is not a compensable damage under these circumstances, apply only to the property, as I say.

So that would then—if I were going to grant, you know where I would be coming from today on their motion.

As to the balance in denying the Motion for Summary Judgment in your favor because, in my opinion, under your complaint you would be entitled not to wait and determine [54] what use is put and to what extent that may ultimately be determined that it causes a greater diminution of the value. At the time that the covenant is severed is the time that your damage is determined, and that damage is the diminution of market value because you no longer have the benefit of that restrictive covenant on the property because their property has—eminent domain has abolished the enforceability of that covenant.

It would leave you only thereafter the same cause of action that Judge McAuliffe says QC had, although agreed it did not cross that threshold.

Under the holding of QC and of the affidavits and information sought here, I would suggest, but without finding at that point, plaintiff also has not crossed that threshold.

However, as I said, I will defer that. You have an opportunity, if that threshold is crossed or at least there

is a factual dispute as to, sufficient to say, if taking an inference most favorable to you, it crosses the threshold, then summary judgment would not be appropriate.

After this, as I said, long-winded dissertation, the bottom line is the Motion for Summary Judgment in favor of the Plaintiff will be denied, all subject to further proceedings on their motion.

Thank you, gentlemen. Somehow when I went through [55] this, looked at it, I said this seems to be—this is too simplistic, so I am obviously not grasping something, but it just seems to me that that is the logical way all of this kind of dovetails together.

Thank you.

MR. FREISHTAT: Your Honor, I think what might be helpful is if you had your comments transcribed and signed.

THE COURT: Sure, if you want it. All right, I will ask—you mean I have got to sign all of that stuff I just said? I will see if I can get them transcribed and then edit out the editorial comment and just leave the factual.

MR. FREISHTAT: Okay. Thank you very much, Your Honor.

MR. MC GIDD: Thank you.

THE COURT: Thank you, counsel.

(Whereupon, the hearing was concluded.)

[56] CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

Civil Number 13718

CS INC. ELECTRO-NUCLEONICS

v.

AN COMM. WASHINGTON SUBURBAN SANITARY COMMISSION

By: /s/ Mary Lou Leidig
MARY LOU LEIDIG
Transcriber

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 13718

ELECTRO-NUCLEONICS, INC.,
Plaintiff,

v.

WASHINGTON SUBURBAN SAN. COMM.,
Defendant.

JUDGE'S COMMENTS

Rockville, Maryland May 2, 1988

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 13718

ELECTRO-NUCLEONICS, INC.,
Plaintiff,
v.
WASHINGTON SUBURBAN SAN. COMM.,
Defendant.

Rockville, Maryland
May 2, 1988

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE WILLIAM M. CAVE,
Judge

APPEARANCES:

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[4] PROCEEDINGS

THE COURT: One thing that—strike that. Let me start first by saying at the hearing, the argument previously raised on the plaintiff's Motion for Partial Summary Judgment, it is now here and the argument—review the memorandum, the Court will grant summary judgment in favor of the defendant, WSSC and enter judgment on the complaint for inverse condemnation.

I further determine it is dispositive of all issues between the parties in this case. It is thereby final and appealable. There is no reason for delay, and the judgment should be entered. Now, I think that I have made a final judgment,—judgment three different ways, and one of them ought to have done it.

Now, the reasons therefore which probably—I think I alluded to previously was that—the reasons that I alluded to are the following. Number one, at the time of the original condemnation by WSSC, the restrictive covenants which were put on to benefit the scheme and design of development for all of the property owners within the —what had formerly been a Contee owned—wasn't it Contee—sand and gravel—

MR. MAGID: Yes, Your Honor—

MR. FREISHTAT: It was Contee, Your Honor.

THE COURT: —owned property for an industrial [5] park. I will approach it, first, why my opinion Judge Atkins, who obviously I would—what I am endeavoring to do is ask if he would take another view or another look at his opinion while he was on the Special Court of Appeals in Frenkel v. WSSC because of the problem that this case shows.

If the neighboring properties who are not the subject of the condemnation proceeding have a diminution in value of their property because of the loss of the right to enforce a restrictive covenant against the condemned property, the difficulty of when that becomes compensable is insurmountable.

It might be easy to say, "Well, that's simple". WSSC owes goes to the land records, they look up and find all of the property that are contained within the development area that all are subject to this restrictive covenant and file a condemnation proceeding, not only in the portion of the land that they seek to condemn, but all of those other properties, and then each of them come in and have to decide then and there whether or not there is a diminution of the market value of the property because it no longer has the right to enforce the restrictive covenant, and if they did not do that or somehow overlooked one or more of the properties, years down the road one of those other properties could come back in and say, "Listen, you still have not condemned my taking--have not condemned my contractual [6] right that attached to my property," and I am trying to think of a way in which he could enforce it.

I guess he could bring an injunction or the others could bring an injunction and say, "Listen, you took the property. You took the right. You have not condemned it, and it is in the nature of severance damages which we are entitled," and the question then is does he sit--how long they sit. Is it a question of laches?

Recognizing what it always at least appears to be, Judge Atkins, if there is a loss, there should be a recovery for that loss. I do not want to put words in his mouth, but he appears to strongly believe in the adage for every wrong there is a remedy, and if you look at first blush to simply say, "Well yes, they had a contractual right. Through action of their own, they lost it. It was taken away, and should they not be entitled to recovery?". I hope that they would equate it more to what occurs when there is diminution in value to property when rezoning occurs on property not around, when other actions may taken that affect that contractual right, and the land owners have a right to expect that that can and will be enforced so long as it exists.

They do not have the to expect that it will exist necessarily forever because the restrictive covenants, for a variety of reasons, can be removed from the property. [7] It would be no different as you—if one property owner violated the covenants in some manner, and it was not enforced against him, they no longer—and let's assume that one of the other property owners was totally unaware of it and relied on the neighbors or someone else to bring it, and no one brought it; then another, then another, then another till pretty soon the covenants are gone. He has lost his contractual right and would have assumed that the other property owners would have enforced it on their behalf and thereby beneficially to him too.

Well, he just cannot rely or assume that, and if it is ultimately destroyed because the scheme of development has been destroyed for failing to enforce it, he has lost that contractual right, and he is not entitled to be compensated for it.

It appears appropriate that the land condemned by WSSC and the Appellate Court's decision that if there is a restrictive covenant, it may increase their value—it may not. It may have no value. It was a factor to be determined at the time of the condemnation proceeding, and as such, on that property was entitled to be compensated.

The loss to the property of Electro-Nucleonics, Incorporated was in July of 1980, if at all, when the WSSC condemned the property. What gives me perhaps the greatest difficulty is I do not know whether or not the balance of [8] the restrictive covenants have been affected because if they are still enforceable to all of the other properties except for that which WSSC has condemned, then they really have not lost their restrictive covenant except as applied to the property.

The suit was brought not on a factual predicate as contained—what is the one in 310 Md?—Maryland Port Authority v. Q.C., but as compensation for a breach of

the covenants, but the covenants no longer exist as it applies to the WSSC property, and they are not entitled to compensation for breach of the covenant.

Based on all of the testimony, there is insufficient evidence that the Governmental action is causing an inverse condemnation to the point that the beneficial use of the property is taken, and although the Maryland Port Administration v. Q.C. Corporation may have gone to trial, the Court of Appeals' determination is that it should not have gone to the jury. There just was not sufficient evidence to allow for any compensation, and the majority at least did not go forth and say, "Well, if there is a partial taking, you are entitled to a little compensation".

I think they recognized the difficulties that that would cause for proof and suits that would be filed every time there was something objectionable used on the property next door to them, but in this case, there certainly is no [9] sufficient showing to establish that the present use by WSSC is causing an inverse condemnation of the property, and even beyond that, this suit is not brought on the inverse condemnation because of the use. This suit is brought claiming compensation for the severance of the restrictive covenant occasioned by the July 1980 taking, and it is just one that the—hopefully it is not in which it is a compensable right in the nature of severance damages to property owners other than the owners of the property condemned, and accordingly, I, on that basis, will enter the judgment.

Now, any other reasons that you have raised also I grant the summary judgment. So I trust it has been raised and considered. There is one issue that was not raised, and that would be the Statute of Limitations or laches, and I do not need to get into it because we first have to determine if it is compensable when you would have to—to condemn it, and I just think the entire problem would be, as I say, not only monumental, but in some instances, insurmountable, go on forever and with no certainty as to what the status is of the land, and I hope

that they would take another look at the Frenkel Case and see that—when this or that gets there.

MR. MAGID: One last matter, Your Honor. You mentioned that you were including—you referred to your [10] prior discussion of this. Would that be—just so the record is clear, are you incorporating in your opinion your reasoning in the February 5th, 1988 hearing on the motion.

THE COURT: I do not remember all the things I said there, but if I incorporate on my reasoning there, I may incorporate something I now disagree with, but for the purpose—I would like to get everything up before the Court of Appeals. I will incorporate by reference all of the rambling dissertation that I made in the prior occasion on the plaintiff's Motion for Summary Judgment.

MR. MAGDID: Thank you.

MR. FREISHTAT: Your Honor, I think they want in Annapolis a written—maybe you just had a one line so you incorporate. I would be glad to order a transcript of your just completed comments.

THE COURT: Why do they need a written—

MR. FREISHTAT: They always that—part of the appeal, so—

THE COURT: —keep referring to either a written opinion or a docket entry, and first we will enter a docket entry granting the Motion for Summary Judgment in favor of the defendants; enter a judgment in favor of the defendants on their Motion for Summary Judgment; and that abolishes all claims.

[11] MR. MAGDID: Thank you very much, Your Honor.

MR. FREISHTAT: Thank you, Your Honor.

THE COURT: I will see you when it gets back here again.

MR. MAGDID: Thank you, Your Honor.

THE COURT: All right. Thank you, gentlemen. It is not for this purpose, but it is sometimes that it appears that the Court of Appeals has consistently said they want but one appeal, so—

MR. MAGDID: They got it.

THE COURT: —and the Trial Judges often think it would be economically advisable where the issues that are really going to be determinative of how the case is perceived, that those appellate issues are determined before the expense of a long trial with a lot of witnesses, and sometimes it appears that way, and I have said in some of them I have granted summary judgment not necessarily thinking that I might be right, but when they decide that issue, whichever way it goes, we will have but one trial.

First of all, I did not just say that, and secondly, this is not a case in which that is my determination. I just feel that that should be the appropriate law, and as I said, with my track record, it will be back, and maybe we will try it.

MR. MAGDID: Thank you very much, Your Honor.

[12] MR. FREISHTAT: Thank you, Your Honor.

THE COURT: All right.

(Whereupon, the hearing was concluded.)

[13] CERTIFICATE

DEPOSITION SERVICES, INC. hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

Civil No. 13718

ELECTRO-NUCLEONICS, INC.

v.

WASHINGTON SUBURBAN SAN. COMM.

By: /s/E. Aleva Schneider
E. ALEVA SCHNEIDER
Transcriber

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil ———

ELECTRO-NUCLEONICS, INC.
a New Jersey Corporation
368 Passaic Avenue
Fairfield, New Jersey 07006
Plaintiff,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION
Defendant.

Serve:

William Lindung, Secretary
4017 Hamilton Street
Hyattsville, Maryland

COMPLAINT FOR INVERSE CONDEMNATION

Comes now the Plaintiff and sues the Defendant for Eminant Domain and in support states as follows:

1. The Plaintiff is a New Jersey corporation which owns property in the State of Maryland and conducts business in that State. It is the owner of the property taken by the Defendant.

2. The Defendant is a municipal corporation, created by the General Assembly of Maryland, its laws are codified as Article 29 of the Annotated Code of Maryland. Pursuant to that section of the Code, the Defendant is charged with the duty to provide water and sanitary sewer service to the resident of the Washington Suburban Sanitary District (WSSD). The WSSD comprises, mainly, most of Montgomery and Prince George's Counties, Maryland.

3. The Plaintiff is the owner of Lot 6, Montgomery Industrial Park, which property is improved with a virus research laboratory (12050 Tech Road, Silver Spring, Maryland).

4. The Defendant, pursuant to a budget item in its Capital Improvement Budget, and in accordance with a court order of the United States District Court for the District of Columbia (Civ. No. 1831-73) did construct on land adjacent and nearby to the Plaintiff's property a sludge processing plant which processes and composts sewage sludge (Site II).

5. At the time the Plaintiff purchased the subject property and continuing to this date, its property was subjected to the restrictive covenants which limited the development and use of the subject property. These same covenants applied and still do apply to Site II. A copy of the covenants are attached hereto as Exhibit A.

6. It is uncontested that the Defendant's activities in Site II violate and are contrary to the allowable rules and activity of Exhibit A.

7. The Defendant has consistently refused to condemn the Plaintiffs interest in these restrictive covenants although it is conceded by Defendant's own counsel that the activity on Site II violate the covenants and Defendants own counsel in the Federal Court did profer to the court that the Defendant would condemn these covenants to allow Site II to operate (Exhibit B and C).

8. The Plaintiff seeks to receive compensation for the Defendants taking of the restrictive covenant for the Site II and the subject property.

9. The parties are unable to agree as to compensation, and in fact the Defendant refuses to negotiate with the Plaintiff.

10. It is estimated that Site II commenced operating on or about April 30, 1983. The taking started at that time and continues to the present.

WHEREFORE, the Plaintiff prays as follows:

1. A taking be declared and the covenants which are described herein be condemned.

2. The Defendant pays to the Plaintiff the sum of Ten Million Dollars ($10,000,000.00) as damages for the taking of the covenants.

3. Such other further relief is the Court may deem appropriate.

Respectfully submitted,

SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.

By /s/ David D. Freishtat
DAVID D. FREISHTAT
8630 Fenton Street, Suite 430
Silver Spring, Maryland 20910
(301) 565-4400

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 13718

ELECTRO-NUCLEONICS, INC.,
Plaintiff,

vs.

WASHINGTON SUBURBAN SANITARY COMMISSION
Defendant.

LINE

Mr. Clerk:

Please amend the *ad damnum* clause by interlineation to amend the damages to Twenty Million Dollars ($20,000,000.00).

SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.

By /s/ David D. Freishtat
DAVID D. FREISHTAT
8630 Fenton St., #430
Silver Spring, MD 20910
301/565-4400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Line was mailed first class, postage prepaid this 17th day of April, 1986, to Robert Drummer, Esquire, 4017 Hamilton Street, Hyattsville, MD 20781.

/s/ David D. Freishtat
DAVID D. FREISHTAT

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

[Apportionment of Representatives in Congress]

Representatives shall be apportioned among the several States according to their respective numbers, count-

ing the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

[*Persons Disqualified from Holding Office*]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

[*What Public Debts Are Valid*]

The Validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or

rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

[*Power to Enforce This Article*]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MARYLAND CONSTITUTION

Art. III,

Section 40. Eminent domain.

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

MARYLAND DECLARATION OF RIGHTS

Article 24. Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land. (1977, ch. 681, ratified Nov. 7, 1978.)

STATUTES INVOLVED

MD. COURTS AND JUDICIAL PROCEEDINGS CODE ANNOTATED

§ 3-412. Supplementary relief.

(a) *Further relief.*—Further relief based on a declaratory judgment or decree may be granted if necessary or proper.

(b) *Application.*—An application for further relief shall be by petition to a court having jurisdiction to grant the relief.

(c) *Show cause order.*—If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted. (An. Code 1957, art. 31A, § 8; 1973, 1st Sp. Sess., ch. 2, § 1.)

§ 5-101. Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced. (An. Code 1957, art. 57, § 1; 1973, 1st Sp. Sess., ch. 2, § 1.)

§ 5-103. Adverse possession; common-law doctrine of prescription and other limitations unaffected.

(a) *In general.*—Within 20 years from the date the cause of action accrues, a person shall:

(1) File an action for recovery of possession of a corporeal freehold or leasehold estate in land; or

(2) Enter on the land.

(b) *Exceptions.*—(1) This section does not affect the common-law doctrine of prescription as it applies to the creation of incorporeal interests in land by adverse use;

(2) This section does not affect the periods of limitations set forth in § 6-103 or § 8-107 of the Real Property Article. (An. Code 1957, art. 57, § 3A; 1973, 1st Sp. Sess. ch. 2, § 1; 1974, ch. 687, § 13.)

MD. REAL PROPERTY CODE ANNOTATED

§ 12-104. Damages to be awarded.

(b) *Where part of tract taken.*—The damages to be awarded where land, or any part of it, is taken is the fair market value of the part taken, but not less than the actual value of the part taken plus any severance or resulting damages to the remaining land by reason of the taking and of future use by the plaintiff of the part taken. The severance or resulting damages shall be diminished to the extent of the value of the special (particular) benefits to the remainder arising from the plaintiff's future use of the part taken.